

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

RAYMOND L. HAYES,

Complainant,

and

CITY OF CHICAGO POLICE DEPARTMENT,

Respondent.

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CHARGE NO.: 1994CA0541
EEOC NO.: 21B933338
ALS NO.: 8290

ORDER

Date Order Issued: January 21, 2011¹

The Commission by a panel of three: Commissioners David Chang, Marylee V. Freeman, and Charles E. Box presiding.

This matter comes on review of the Supplemental Recommended Order and Decision of Administrative Law Judge ("ALJ") Sabrina Patch, which issued on March 11, 2010.

For Complainant: Kenneth N. Flaxman, Esq.

For Respondent: Mara S. Georges, Esq.
Corporation Counsel of the City of Chicago

Illinois Human Rights Commission: Harriet Parker, General Counsel
Donyelle L. Gray, Deputy General Counsel
Evelio Mora, Assistant General Counsel

On review of ALJ Patch's recommendations, the public hearing record, the exceptions filed by the Complainant, and the *Response to Attorney's Fee Petition* filed by one of the Complainant's former attorneys, Ms. Ayesha S. Hakeem, and for the reasons set forth herein, the recommendations of ALJ Patch are sustained subject to modification of the manner in

¹ The matter was heard and decided by a panel of three Commissioners on January 12, 2011. Thus, it shall be reflected that this Order was entered on January 12, 2011.

which the attorney's fees shall be disbursed between the Complainant and the Complainant's former attorneys.

IT IS HEREBY ORDERED THAT:

The findings of the Supplemental Recommended Order and Decision are sustained and adopted as the final Order and Decision of the Commission, subject to the following modifications:

For the reasons stated below, of the \$400,555.50 in attorney's fees awarded to the Complainant for legal services provided by his former attorneys, Ms. Hakeem and Raymond F. Gunn, and paralegal Jawad H. Hakeem, the Respondent shall pay \$ 5,000.00 directly to the Complainant. The Respondent shall pay the remaining \$ 395,555.50 in attorney's fees directly to Ms. Hakeem.

Furthermore, Ms. Hakeem's portion of the overall attorney's fee award shall be reduced by \$ 5,000.00. Therefore, Ms. Hakeem's attorney's fees shall be reduced from \$ 348,316.00 to \$ 343,316.00, plus she shall recover \$ 7,008.90 for the paralegal services of Mr. Hakeem, for a total compensation of \$ 350,324.90. Mr. Gunn's attorney's fees shall remain \$ 45,230.20.

I. Nature of the Case

On September 3, 1993, the Complainant, Raymond L. Hayes, a former Chicago Police Officer, filed a charge of discrimination against the Respondent, City of Chicago Police Department. Subsequently, on his own behalf, the Complainant filed a *Complaint of Civil Rights Violation* with the Commission on July 20, 1994, alleging unlawful discrimination on the basis of his race, age, and retaliation, in violation of the Illinois Human Rights Act. During the proceedings, the Complainant voluntarily dismissed the retaliation and age discrimination claims. The matter proceeded to a public hearing on the race discrimination claim.

II. Proceedings

A. Hearing and Exceptions to the ROD

A public hearing was held during September 12-16, 2005; September 19-23, 2005; September 26-27, 2005; September 29-30, 2005, and October 11, 14, and 20, 2005, before ALJ Patch. During this time the Complainant's counsel of record were Ms. Hakeem and Raymond F. Gunn.

On May 27, 2009, ALJ Patch issued a Recommended Liability Determination ("RLD"), in which she found that the Complainant had proven his race discrimination claim by a preponderance of the evidence. The RLD included recommendations of compensatory and injunctive relief for the Complainant based on ALJ Patch's findings. Finally, the RLD provided that the Complainant had 21 days after service of the RLD on the parties to file a petition for attorney's fees and costs.

On June 25, 2009, the Complainant filed what purported to be "exceptions" to the RLD. However, Commission rules do not permit the Commission to consider exceptions to RLDs. The Commission may only consider exceptions to RODs. See 56 Ill. Admin. Code § 5300.920.

On July 1, 2009, ALJ Patch issued her Recommended Order and Decision ("ROD"). In the ROD, ALJ Patch incorporated her findings on liability and damages outlined in Recommendations 1 through 6 of the RLD. In addition, ALJ Patch determined that the Complainant had waived attorney's fees and costs because the Complainant did not submit a fee petition.

On July 14, 2009, the Respondent filed exceptions to the ROD. The Complainant did not file exceptions to the ROD. "The failure to file exceptions to a Recommended Order and Decision shall constitute a waiver of any arguments which could have been made to a Commission panel." 56 Ill. Admin. Code § 5300.910.

On July 20, 2009, Ms. Hakeem filed a *Motion to Reconsider*, wherein the Commission was asked to reconsider ALJ Patch's determination that the Complainant had waived attorney's fees.

On September 16, 2009, the Commission via a panel of three Commissioners ruled on the Respondent's Exceptions to the ROD, and Ms. Hakeem's *Motion to Reconsider*. The Commission determined it lacked jurisdiction to consider the Complainant's exceptions to the RLD. The Commission also adopted all of ALJ Patch's recommended relief in Recommendations 1 through 6 as its final Order and Decision.

However, the Commission was persuaded by Ms. Hakeem's *Motion to Reconsider*, and declined to adopt ALJ Patch's recommendation that the Complainant had waived attorney's fees. The Commission remanded the matter to the Administrative Law Section for further proceedings limited solely to determining the amount of the Complainant's attorney's fees.

The Commission's ruling of September 16, 2009, was served on the parties via a written order on December 7, 2009. The Commission shall herein reference the September 16, 2009, ruling and the December 7, 2009 written order collectively as the "Remand Order."

B. Decision on Remand to the Administrative Law Section

Following the issuance of the Remand Order, the matter was reassigned to ALJ Patch. The Complainant's former attorneys, Ms. Hakeem and Mr. Gunn, presented their fee petitions for ALJ Patch's consideration.

On March 11, 2010, ALJ Patch issued the Supplemental Recommended Order and Decision ("SROD"). In the SROD, ALJ Patch recommended the Complainant receive all other relief recommended in the RLD of May 27, 2009.

ALJ Patch further recommended the Respondent pay the Complainant \$ 400,555.50 for reasonable legal service fees incurred for the services of Ms. Hakeem, Mr. Gunn, and paralegal Jawad H. Hakeem. ALJ Patch recommended the legal fees be divided as follows: (a) \$ 348,316.00 for Ms. Hakeem; (b) \$ 45,230.20 for Mr. Gunn, and (c) \$ 7,008.90 for Mr. Hakeem.

On April 12, 2010, the Complainant filed Exceptions to the SROD. On May 4, 2010, the Respondent filed a Reply to the Complainant's Exceptions.

On May 5, 2010, Ms. Hakeem filed a *Response to Attorney's Fee Petition Filed by Complainant*. According to this *Response*, on January 26, 2010, while the matter was pending before ALJ Patch on remand, the Complainant filed a *Petition for Attorney's Fees* in which he requested that all attorney's fees be paid directly to him. In her *Response*, Ms. Hakeem states that she, Mr. Gunn, and Mr. Hakeem currently reside in Ghana; therefore, because the Complainant did not serve them with a copy of his *Petition* via e-mail, they did not receive service of the Complainant's *Petition* until late April 2010, when they returned to the United States.² Ms. Hakeem further states that the Complainant has paid her \$ 5,000.00 to represent him in the Commission proceedings. Therefore, Ms. Hakeem argues that of the \$ 400,555.50 in attorney's fees recommended in the SROD, the Complainant is only entitled to direct payment of \$ 5,000.00, while the remaining \$ 395,555.50 should be made payable to Ms. Hakeem.

² Pursuant to an Order of July 19, 2006 issued by ALJ Patch, the record was amended to reflect that the address of record for the Complainant would include e-mail addresses for Ayesha Hakeem and Raymond Gunn because they would be living in Ghana for extended periods of time, and therefore would be unable to receive timely service of pleadings via U.S. Mail.

III. Standard of Review

In reviewing an administrative law judge's Recommended Order and Decision, the Commission does not conduct a *de novo* review of the evidence. Rather, the Commission will adopt the ALJ's findings unless they are demonstrated to be against the manifest weight of the evidence. 775 ILCS 5/8A-103(E)(2).

IV. Complainant's Exceptions

Before delving into his Exceptions, the Complainant states his belief that the Remand Order was a final adjudication of all issues of liability and damages.

In the alternative, the Complainant states that if the Commission finds that the Remand Order was not a final adjudication of all issues of liability and damages, then for his Exceptions, the Complainant argues that he is entitled to additional compensatory and injunctive relief.

The Complainant's Exceptions are not persuasive. Recommendation #2 of the SROD does not undo the finality of the Commission's Remand Order relative to the issue of liability and damages. In the Remand Order, the Commission expressly adopted ALJ Patch's Recommendations 1 through 6 of the RLD, which were incorporated by reference into the ROD, as its final Order and Decision:

The Respondent's exceptions to the Recommended Order and Decision are not persuasive, and ALJ Patch's Recommendations 1 through 6 are sustained and herein adopted by the Commission as its final Order and Decision.

See Remand Order, p. 10.

The Complainant failed to file timely exceptions to the ROD. Therefore, the Complainant has waived his right to make any further arguments concerning liability and damages. See 56 Ill. Admin. Code § 5300.910.

V. Ayesha S. Hakeem's Response to Complainant's Attorney's Fee Petition

The Complainant's former attorney, Ms. Hakeem, filed a *Response to the Complainant's Attorney's Fee Petition*. In her *Response*, Ms. Hakeem objects to the Complainant's contention that he is entitled to receive direct payment of all attorney's fees. Ms. Hakeem acknowledges that the Complainant has already paid her \$ 5,000.00 for her representation in the Commission

proceedings. Therefore, Ms. Hakeem argues that the Complainant is only entitled to direct payment of \$ 5,000.00 for the attorney's fees he actually incurred. Ms. Hakeem argues that the remaining balance of \$ 395,555.50 should be made payable directly to her.

In light of the information volunteered by Ms. Hakeem in the *Response*, the Commission finds it appropriate to modify the SROD in order to reflect an accurate disbursement of the attorney's fees between the Complainant and the Complainant's former counsel.

Of the \$ 400,555.50 in attorney's fees, the Respondent shall pay \$ 5,000.00 directly to the Complainant. The Respondent shall pay the remaining \$ 395,555.50 directly to Ms. Hakeem.

In addition, because the Complainant has already paid Ms. Hakeem \$ 5,000.00 to represent him in the Commission proceedings, Ms. Hakeem's portion of the total attorney's fee award shall be reduced by \$ 5,000.00. Therefore, Ms. Hakeem's fees shall be reduced to \$ 343,316.00, plus she shall recover \$ 7,008.90 for the paralegal services of Mr. Hakeem, for a total compensation of \$ 350,324.90. Mr. Gunn's attorney fees shall remain \$ 45,230.20.

The SROD, as herein amended, is adopted as the final Order and Decision of the Commission.

WHEREFORE, IT IS HEREBY ORDERED:

1. The Complainant's Exceptions to the Supplemental Recommended Order and Decision are not persuasive. Therefore, the Commission's prior decision entered September 16, 2009, wherein the Commission adopted ALJ Patch's Recommendations 1 through 6 as its final Order and Decision, remains undisturbed.
2. The Supplemental Recommended Order and Decision is also adopted as the final Order and Decision of the Commission, subject to the following modification: Of \$ 400,555.50 in attorney's fees awarded to the Complainant, the Respondent shall remit payment of \$ 5,000.00 directly to the Complainant Raymond Hayes. The Respondent shall pay the remaining \$ 395,555.50 in attorney's fees directly to Attorney Ayesha S. Hakeem.
3. Ms. Hakeem's portion of the attorney's fees shall be reduced by \$ 5,000. Ms. Hakeem shall recover \$ 343,316.00 in attorney's fees, plus \$ 7,008.90 for services of her paralegal. In total, Ms. Hakeem shall be entitled to \$ 350,324.90, as compensation for her legal services.

4. Attorney Raymond F. Gunn shall be entitled to \$ 45,230.20 in attorney's fees.

STATE OF ILLINOIS)	
)	Entered this 12th day of January 2011.
HUMAN RIGHTS COMMISSION)	

Commissioner David Chang

Commissioner Marylee V. Freeman

Commissioner Charles E. Box

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

**IN THE MATTER OF:
RAYMOND HAYES,**

Complainant,

and

**CITY OF CHICAGO POLICE DEPARTMENT,
Respondent.**

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) Charge No: 1994CA0541
) EEOC No: 21B93 3338
) ALS No: 8290
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SUPPLEMENTAL RECOMMENDED ORDER AND DECISION

Following a *Recommended Order and Decision* entered on July 1, 2009, a Commission panel remanded this matter to the administrative law section by order dated September 16, 2009. The matter was remanded solely for the purpose of determining the amount of Complainant's attorney's fees and costs.

Complainant filed a petition for attorney's fees on January 29, 2010. Respondent filed objections to the petition on February 18, 2010. This *Supplemental Recommended Order and Decision* addresses the issue of Complainant's attorney's fees and costs.

FINDINGS OF FACT

1. Complainant was represented by Ayesha S. Hakeem and Raymond F. Gunn at the time the *Recommended Order and Decision* was issued.
2. Complainant requests an hourly rate of \$265.00 for the services of Ayesha S. Hakeem and Gunn. \$265.00 is a reasonable hourly rate for the legal services rendered in this matter.
3. Complainant requests an hourly rate of \$30.00 for the legal assistant services of Jawad H. Hakeem. \$30.00 is a reasonable hourly rate for legal assistant services rendered in this matter.

4. Complainant requests an award for 1,371.77 hours of services performed by Ayesha S. Hakeem; 170.68 hours of services performed by Gunn; and 233.63 hours of services performed by Jawad H. Hakeem. The number of hours requested for the services performed by Gunn and Jawad H. Hakeem were reasonable and necessary for the litigation of this matter.
5. 57.37 hours of services rendered by Ayesha S. Hakeem were not necessary for the litigation of this matter. Complainant is entitled to an award for 1,314.40 hours of services performed by Ayesha S. Hakeem.

CONCLUSIONS OF LAW

1. Pursuant to Section 8A-104(G) of the Illinois Human Rights Act, (Act), 775 ILCS 5/1-101 *et seq.*, a prevailing Complainant is entitled to reasonable attorney's fees and costs incurred to litigate the case.
2. Complainant has provided sufficient documentation to provide for an independent determination as to whether the hourly rates, the number of hours expended and the specific work performed were justified.

DETERMINATION

Complainant is entitled to an award of \$ \$400,555.50 in reasonable fees incurred in the litigation of this matter for the services of Ayesha S. Hakeem, Raymond H. Gunn and Jawad H. Hakeem.

DISCUSSION

After a finding of liability against Respondent, Complainant is entitled to reasonable attorney's fees and costs incurred in litigating the matter. The purpose of the fee award is to provide an effective means of access to the judicial process to victims of civil rights violations who might not otherwise have the means to retain counsel. *Clark and Champaign National Bank*, IHRC, 354(J), July 2, 1982. In *Clark and Champaign National Bank*, the Commission set

forth guidelines to be considered in awarding attorney's fees. The burden of proof for requesting attorney's fees rests with the Complainant.

Appropriate Hourly Rate

When considering a fee petition, it is first necessary to establish a reasonable hourly rate. An appropriate hourly rate is generally dependent upon the actual hourly rate the attorney charges, the experience of the attorney and the prevailing community rate for similar legal services. *Clark and Champaign National Bank, supra.*

Ayesha S. Hakeem and Raymond F. Gunn

Complainant filed a *Petition for Attorney's Fees* on January 29, 2010. Complainant requests an hourly fee of \$265.00 for the services of Ayesha S. Hakeem and for the services of Raymond F. Gunn. In support of this request, Complainant submits the affidavits of Ayesha S. Hakeem, and Raymond F. Gunn.

In her affidavit, Ayesha S. Hakeem avers that she graduated from DePaul College of Law in 1987. She was subsequently hired as an associate attorney for the law firm of Sidley and Austin where she was assigned to the general litigation group. While there, she worked extensively in the employment discrimination section. She left Sidley and Austin in 1988 and worked as an associate with the law firm of Sachnoff and Weaver where she was assigned to the employment law section. While at Sachnoff and Weaver, she co-authored two chapters for the Illinois legal practice publication, *ICLE*, on employment law. In 1990, she left Sachnoff and Weaver to start her own firm, Ayesha S. Hakeem and Associates, where she focused her practice on representing complainants/plaintiffs in employment discrimination cases. From 1990 until 2005, while litigating this matter before the Commission, she has been the lead attorney in over forty cases, which she litigated before the Commission as well as in federal district court.

In his affidavit, Raymond F. Gunn avers that he acted as second chair to Ayesha S. Hakeem in this matter. Gunn says that he graduated from the University of Pittsburgh Law School in 1978, after which he was hired as an Illinois Assistant Attorney General in the revenue litigation division. Subsequently, he was hired as an attorney by the United States Justice Department, Office of the U.S. Trustee. There, his duties included supervision of Chapter 11 business reorganization cases filed in the Northern District of Illinois and litigation in the Bankruptcy and District Courts. He left the Justice Department in 1982 to start his own law firm, Sutton & Gunn, focusing on civil litigation. He subsequently became a partner in Ankamah & Gunn, focusing on civil litigation and commercial law. He has represented complainants and plaintiffs in cases pending before the Commission and in federal district court. Gunn's normal hourly fee is \$300; however, he has reduced his hourly rate to \$265 for the litigation of this case.

Both Ayesha S. Hakeem and Gunn present the affidavit of Paul Otubusin, an Illinois attorney licensed to practice in Illinois since 1990. Otubusin avers that he is a principal in the law firm of Otubusin & Associates, P.C., and that he represents employees in labor, employment and employment discrimination litigation. Otubusin says that the lowest billing rate charged for legal services in his firm is \$350.00 per hour.

Complainant's request for \$265.00 per hour for the services of Ayesha S. Hakeem and Gunn is adequately supported as a reasonable rate for the litigation of this matter.

Paralegal Services

Complainant requests \$30 per hour for the services of Jawad H. Hakeem. In his affidavit, Jawad H. Hakeem avers that he assisted Ayesha S. Hakeem in the preparation for and in the litigation of the public hearing in this matter from August 22, 2010 until September 12, 2005. (the affidavit obviously misstates the date as *August 22, 2010*; it should read August 22, 2005 until September 12, 2005). Jawad H. Hakeem says that all of his work was directed by Ayesha S. Hakeem.

Respondent objects to an award of paralegal fees, arguing that Complainant failed to demonstrate that the services performed significantly contributed to the attorney's "impressive command of the facts and relevant law." Respondent appears to argue that this standard, as set out in *Pachowicz v. Aero Testing and Balancing Systems, Inc.*, IHRC, ALS No. 1412, March 31, 1988, aff'd on appeal sub nom *Aero Testing and Balancing Systems, Inc. v. Illinois Human Rights Commission*, 185 Ill App. 3d 956, 541 N.E.2d 1229 (1st Dist. 1989), must be met to support an award of paralegal fees. Respondent further cites *Matejewski* and *State of Illinois, Department of Corrections, Pontiac Correctional Center*, IHRC, ALS No. 643(SXL), March 10, 1986, pointing out that the administrative law judge there awarded paralegal fees after finding that the paralegal's contribution was both sophisticated and a substantial component of the legal product provided. Respondent contends that failing to meet both of the standards as set out in *Pachowicz* and *Matejewski* justifies a denial of paralegal fees.

Although the administrative law judge in *Matejewski* noted that the paralegal's work was sufficiently sophisticated and comprised a substantial component of the legal product, this observation was made in the context of considering whether the work of the paralegal was reasonable and not duplicative of other legal work. In *Matejewski*, the administrative law judge allowed compensation for tasks such as legal research, transcript abstraction and brief preparation, and disallowed compensation for certain minor tasks that took only minutes to perform. The administrative law judge specifically disallowed compensation for fifteen minutes filing documents, thirty minutes preparing a court document and fifteen minutes for brief preparation and review. To conclude that the *Matejewski* analysis stands for the proposition that an award of paralegal fees requires a finding that the specific paralegal services were sophisticated and a substantial component of the legal product provided is a misplaced conclusion.

Respondent's reliance on *Pachowicz*, however, is well taken. The Commission has followed the standard as set out in the *Pachowicz* decision, recognizing that tasks performed by paralegals must surpass the level of skill required for mere clerical tasks for which separate compensation is not appropriate. See, *Munoz and Golden Enterprises*, IHRC, ALS No. 7033, and April 24, 1998, amended May 4, 1998.

Respondent argues that paralegal fees here should be denied as Complainant fails to establish that the tasks performed by Jawad H. Hakeem were more than merely clerical and unsophisticated. Respondent also points out that Jawad H. Hakeem failed to provide evidence of his paralegal experience or qualifications and further failed to submit support for the prevailing rate for paralegals.

Respondent's arguments are rejected for the following reasons. In his affidavit, Jawad H. Hakeem states that his services included organizing and preparing exhibits for and during the public hearing. He further states that his paralegal experience was gained by previously working to assist Ayesha S. Hakeem in other litigation. He says that, based on this experience, he believes his requested hourly rate is in line with other paralegals in the Chicago area. Ayesha S. Hakeem states in her affidavit that paralegal services were required to assist in the preparation and handling of exhibits and in the coordination of exhibits with witness outlines.

I note that this case was a particularly complex and difficult one to litigate as evidenced by the length of the public hearing (seventeen days) and the number of admitted exhibits (the parties admitted over 500 group exhibits). Many hours were spent during the hearing admitting exhibits into the record. I find it prudent and reasonable that Complainant's counsel would have found it necessary to hire an assistant to manage such a massive amount of exhibits so that the litigation team could concentrate its efforts on the complex litigation aspects of the public hearing. Under the particular facts of this case, the exhibit management services provided by the paralegal cannot reasonably be characterized as merely clerical and lacking in skill.

In researching recent Commission decisions, paralegal services were compensated at the rate of \$90 per hour for legal assistants in *Hall v. IHOP*, IHRC, ALS No. 07-064, July 7, 2008; \$80-\$100 per hour for paralegal services in *Orozco and Dycast*, IHRC, ALS No. 7178R, July 7, 2008; \$50 per hour in the matter of *Tolbert and Fraternal Order of Eagles Olney Aerie*, IHRC, ALS No. S12132, July 7, 2005; \$75 per hour in *Kimbrough and School Dist. of Markham*, IHRC, ALS No. 10397, August 10, 2004; and \$65 per hour in *Vij and Six Flags Theme Park*, IHRC, ALS No. 11106C, April 3, 2002. I find paralegal services to be a reasonable expense for the litigation of this matter and further find the requested hourly rate of \$30 to be reasonable and adequately supported.

Appropriate Number of Hours Expended

Once the hourly rate is decided upon, the next step is to determine whether the hours claimed are justified. Complainant files a billing itemization detailing the time spent and hours billed for specific services performed. The billing statement is sufficiently detailed for examination.

Ayesha S. Hakeem

Clerical and Messenger tasks

Respondent objects to 21.66 hours of time spend in what it terms “basic clerical tasks” it insists are not recoverable. Respondent argues that time spent in clerical and messenger tasks such as hand delivery of filings are generally not compensable under the Act. Respondent cites *Altes and Illinois Dept. of Employment Security*, IHRC, ALS No. 2847(K), July 10, 1989, *Kauling-Schoen and Silhouette American Health Spas*, IHRC, ALS No. 2918(M), February 8, 1993 and *Florence Johnson and Ranch Steak House*, IHRC, ALS No. 1823, March 2, 1987, in support of its argument.

A review of the itemizations pointed out by Respondent support that some of the time was spent hand delivering pleadings. However, portions of the entries also included the drafting

of cover letters and preparation of filing notices and certificates of service, tasks that are not clerical or messenger related. Therefore, 50% of the itemized 21.66 hours time or 10.83 hours will be deducted as non-compensable clerical and messenger tasks.

Work Performed on Analogous Federal Claim

Next, Respondent objects to 35.63 hours of time it maintains were related to work performed on an analogous claim filed in federal court. Respondent's objection is well taken. The record supports that at some point in time, Complainant pursued an analogous claim in federal court. A review of the itemized entries objected to by Respondent supports that the time expenditures were related to the federal claim and not related to work performed in this case before the Commission. Because these time expenditures were not reasonably related to the litigation of this claim before the Commission, they are not compensable; therefore, 35.63 hours will be deducted from the total time expenditures.

Duplicative Entries

Respondent objects to certain entries it maintains are duplicative. Respondent points to eight sets of entries it compares that appear to describe duplicative tasks. A review of the subject entries supports Respondent's position. Therefore, as set out below, 10.91 hours will be deducted from the total time expenditures.

8/31/1994 - Review of Notice of filing of certificate and HRC Order entered on Aug 29, 1994 and sent to Jay Kertez - .16 hours. This entry is disallowed as duplicative of the 8/30/1994 entry.

2/04/1998 - Review of file and drafting Complainant's First Set of Interrogatories and Requests to Produce - 3.0 hours. This entry is disallowed as duplicative of the 2/02/1998 entry

2/07/1998 - Review of file; discussion with client and drafting Complainant's First Set of Interrogatories and Requests to Produce; Notice of Filing and Certificate of service - 2.5 hours. This entry is disallowed as duplicative of the 2/04/1998 entry.

2/08/1998 - Drafting Complainant's Interrogatories and Requests to Produce (53 pages with 81 Interrogatories/Requests to Produce); Certificate of Service and Notice of Filing - 2.25 hours. This entry is disallowed as duplicative of the 2/04/1998 entry.

4/20/1998 - Drafting Notice of Filing to file Certificate of Service to Complainant's Responses to Respondent's First Set of Interrogatories and Request to Produce and filing at HR- 1.0 hour. This entry is disallowed as duplicative of the 4/20/1998 entry.

8/17/1998 - Review of Order from HRC setting new Public Hearing dates entered on August 12, 1998 and mailed to Jay Kertez - .25 hours. This entry is disallowed as duplicative of a second 8/17/1998 entry.

1/26/2004 - Preparation and filing at HRC of Notice of Filing and Certificate of Service of the second draft of the Joint Pre-hearing Memorandum - .75 hours. This entry is disallowed as duplicative of a second 1/26/2004 entry.

7/30/2005- Review of files, Plaintiff's First Request to Produce to CPD in 95C3411 against CPD and George Lopezello requesting list of officers with multiple excessive force complaints filed in court May 17, 1996 in preparation for public hearing - 1.0 hours. This entry is disallowed as duplicative of a second 7/29/2005 entry.

Excessive Hours

Finally, Respondent objects to ten entries as having required excessive time for the tasks performed. Respondent points to entries on 6/9/1997, 2/9/1998, 10/23/1998, 8/16/2001, 11/21/2001, 12/31/2001, 1/3/2002, 2/27/2002, 6/23/2003 and 8/24/2004. On review of the entries, I find that the time expenditures are reasonable for the specific tasks involved.

Total Amount of Reasonable Attorney's fees

Ayesha S. Hakeem

Complainant requests 1371.77 hours for the services of Ayesha S. Hakeem. As previously discussed, these hours are being reduced by 57.37 hours. Complainant is entitled to \$348,316.00 for 1,314.40 hours of work performed at \$265 per hour for the services of Ayesha S. Hakeem.

Raymond F. Gunn

Complainant requests 170.68 hours for the services of Raymond F. Gunn. On review of the itemized time expenditures, I find the work performed reasonable for the litigation of this matter. Complainant is entitled to \$45,230.20 for 170.68 hours of work performed at \$265 per hour for the services of Raymond F. Gunn.

Jawad H. Hakeem

Complainant requests 233.63 hours for the services of Jawad H. Hakeem. On review of the itemized time expenditures, I find the work performed reasonable for the litigation of this matter. Complainant is entitled to \$7,008.90 for 233.63 hours of work performed at \$30 per hour for the services of Jawad H. Hakeem.

Costs

Complainant is not requesting an award for costs incurred in the litigation of this matter.

RECOMMENDATION

Accordingly, I recommend that:

1. Respondent pay Complainant \$400,555.50 for reasonable legal service fees incurred for the services of Ayesha S. Hakeem, Raymond F. Gunn and Jawad H. Hakeem.
2. Complainant receive all other relief recommended in the Recommended Liability Determination entered May 27, 2009.

HUMAN RIGHTS COMMISSION

By: _____
SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section

ENTERED: March 11, 2010

**STATE OF ILLINOIS
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IN THE MATTER OF:

RAYMOND L. HAYES,

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REMAND ORDER

The Commission by a panel of three: Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding.

On review of the Recommended Order and Decision of Administrative Law Judge Sabrina Patch, on review of the Recommended Liability Determination of Administrative Law Judge Sabrina Patch, and on consideration of a Motion to Reconsider filed by Ms. Ayesha S. Hakeem and Mr. Raymond Gunn,

For Complainant:

Kenneth N. Flaxman, Esq.

Kenneth N. Flaxman PC

For Respondent:

Angela C. Thomas

Corporation Counsel of the City of Chicago

Illinois Human Rights Commission:

Harriet Parker, General Counsel

Donyelle Gray, Deputy General Counsel

This matter comes before the Commission on: (1) Respondent's Exceptions to a Recommended Order and Decision ("ROD") issued by Administrative Law Judge Sabrina Patch; (2) Complainant's Exceptions to the Recommended Liability Determination ("RLD"), and (3) a Motion for Reconsideration filed by the Complainant's former attorneys, Ayesha S. Hakeem and Raymond F. Gunn (hereinafter sometimes collectively referred to as "the Movants").

On review of Judge Patch's recommendations, the public hearing record, the exceptions filed by the parties, and the Motion for Reconsideration filed by the Movants, and for the reasons set forth herein, the recommendations of Judge Patch are adopted in part and not adopted in part.

IT IS HEREBY ORDERED THAT:

The Respondent's Exceptions are not persuasive, and the Commission adopts the Recommendations by ALJ Patch that the complaint be sustained on the Complainant's race discrimination claim. The Commission further sustains and adopts the recommended relief as ALJ Patch outlined in Recommendations 1 through 6 of the RLD, and which were incorporated by reference into the ROD currently under review.

However, the Commission declines to adopt ALJ Patch's determination that the Complainant is not entitled to an award of attorney's fees or costs because her finding that the Complainant had waived fees and costs is against the manifest weight of the evidence.

The Movants, in their Motion to Reconsider, demonstrated that Movant Raymond Gunn was not properly and timely served at either his land address of record, nor his e-mail address of record. Movant Ayesha Hakeem demonstrated that she was not properly and timely served at her e-mail address of record, as reflected in a Commission order of July 19, 2006. Therefore, because the Movants demonstrated that they had no opportunity to timely submit their fee and cost petitions within 21 days of service of the RLD, there is no evidence in the record to support ALJ Patch's determination that the Complainant waived his right to attorney's fees and costs.

Finally, the Commission declined review of the Complainant's Exceptions to the Recommended Liability Determination on the grounds that the Commission lacks statutory authority and jurisdiction to review exceptions to RLDs.

I. NATURE OF THE CASE

Raymond L. Hayes, the Complainant, is an African American male who was a police officer with the City of Chicago Police Department, the Respondent. The Complainant began working for the Respondent on October 18, 1976. On September 12, 1991, the Complainant's birthday, the Complainant had a scheduled day off from work; however, he was required by the Respondent to attend traffic court that day. On his way to traffic court in his personal automobile, the Complainant became involved in an incident with a taxi driver. The Complainant exited his vehicle, opened the taxi cab door, ordered the taxi driver out, pulled his weapon on the unarmed taxi driver, allegedly beat the taxi driver in the head with the butt of his gun, arrested the taxi driver, and transported the taxi driver to a police station. There were several witnesses to the incident who reported what they observed to the Office of Professional Standard (OPS).

The OPS is a City of Chicago entity which investigates allegations of police misconduct and excessive force, and makes recommendations of discipline. Police officers are governed by the Rules and Regulations of the Chicago Police Department (the "CPD Rules"), which is published by the Police Board.

When the OPS received the reports regarding the Complainant's alleged misconduct, it opened a Complaint Registry File (a "CR file"). A civilian OPS investigator was assigned to investigate the allegations against the Complainant. The OPS investigator concluded that the Complainant had engaged in excessive force and made a finding of sustained as to violations of certain CPD Rules, and a finding of not sustained as to other CPD Rules.

The CR file was forwarded to the Chief Administrator for the OPS, Gayle Shines, who recommended that the Complainant be discharged. Shines forwarded a Recommendation for Separation form to the then Superintendent of Police, Matthew Rodriguez. Superintendent Rodriguez had the absolute discretion to accept, reject, or adjust the recommended OPS Penalty. In this case, Superintendent Rodriguez adopted the Recommendation for Separation, and sought to impose the discipline of discharge on the Complainant. Superintendent Rodriguez filed his recommendation for discharge with the Police Board on approximately May 28, 1992.

The Police Board was a civilian oversight panel, separate from the Chicago Police Department, and was composed of nine members appointed by the City of Chicago Mayor, with the approval of the Chicago City Council. The Police Board operated with a budget separate from the Chicago Police Department, and under a separate chain of command of the then Superintendent Rodriguez. Since the Complainant was recommended for discharge, the matter was referred to the Police Board for an adversarial due process hearing. Once the Police Board determines that the police officer is guilty of the alleged violations, the Police Superintendent's recommended discipline must be imposed.

The Police Board determined that the Complainant had committed the alleged misconduct, and issued its decision to discharge the Complainant on March 5, 1993. The Complainant was notified of the decision on March 9, 1993. The Complainant sought administrative review of the Police Board's decision in the circuit court, which upheld the Police Board's determination. This determination was upheld by the Illinois Appellate Court.

On September 3, 1993, the Complainant filed a charge of discrimination with the Illinois Department of Human Rights. On July 20, 1994, the Complainant filed a complaint with the Illinois Human Rights Commission in which he alleged that the Respondent had discriminated against him on the basis of age and race, and that the Respondent had engaged in unlawful retaliation. The Complainant subsequently voluntarily dismissed the retaliation and age discrimination claims.

II. PROCEEDINGS

The complaint proceeded to a lengthy public hearing solely on the issue of race discrimination on September 12 -16, 2005; September 19-23, 2005; September 26-27, 2005; September 29-30, 2005; and October 11, 14, and 20, 2005.

The Movants had represented the Complainant through the public hearing. Each Movant had filed separate appearances for the Complainant. On July 19, 2006, following the Movants' "Motion to Amend Complainant's Address for Purpose of

Notification," ALJ Patch entered an order which amended the Complainant's address for purposes of service to include e-mail addresses for the Movants. At that time, the RLD had not yet issued.

The Movants had requested that they be served with the RLD at their e-mail addresses because they would be relocating to Ghana, West Africa. The Movants believed that regular mail delivery under these circumstances would prove inadequate to provide them with timely notice of service of the RLD, and with sufficient time to file their fee and cost petitions within 21 days after service of the RLD.

The motion was granted for "good cause shown," and the July 19, 2006 Order reflected that the address of record for the Complainant would be amended to include e-mail addresses for the Movants.

The RLD issued on May 27, 2009. The Commission served Ms. Hakeem with the RLD at a P.O. Box address that she had provided to the Commission, but not to her e-mail address. Mr. Gunn was not served with the RLD either via regular mail to the address stated on his appearance, nor via e-mail.

In the RLD, ALJ Patch recommended that the Complainant's race discrimination claim be sustained. ALJ Patch further recommended that the Complainant was entitled to compensatory damages, as outlined in her Recommendations Nos. 1 through 5. ALJ Patch's Recommendation No. 6 recommended injunctive relief, specifically that the Respondent cease and desist from further race discrimination.

ALJ Patch recommended in Recommendation No. 7 that the Complainant was entitled to have his reasonable attorney's fees and costs paid by the Respondent, pending the timely submission of a fee and cost petition. The RLD provided that the Complainant would have 21 days following service of the RLD by which to file the fee and costs petition.

On July 1, 2009, ALJ Patch issued the ROD. The ROD incorporated by reference Recommendations 1 through 6, as outlined in the RLD. However, ALJ Patch determined that the Complainant had waived attorneys fees and costs because the Complainant had not submitted a fee and costs petition within 21 days of service of the RLD.

III. STANDARD OF REVIEW

In reviewing an Administrative Law judge's Recommended Order and Decision, The Commission does not conduct a *de novo* review of the evidence. Rather, the Commission will adopt a Judge's findings unless they are demonstrated to be against the manifest weight of the evidence.

IV. RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER & DECISION

ALJ Patch's determination that the Complainant had proven race discrimination by a preponderance of the evidence is not against the manifest weight of the evidence, and therefore this determination is adopted by the Commission as its final Order and Decision. ALJ Patch's Recommendations No. 1 through 6 are also not against the manifest weight of the evidence, and are herein adopted by the Commission.

The Respondent contends in its Exceptions that: **(A)** Collateral estoppel barred the Complainant's race discrimination claim before the Commission; **(B)** The Complainant failed to prove that he was discharged based on race, and **(C)** ALJ Patch's finding of race animus is flawed and not supported by the evidence. The Commission found each argument to be unpersuasive for the reasons stated below.

A. Collateral Estoppel

The Respondent argues in its exceptions that the doctrine of collateral estoppel applies here because the proceedings before the Police Board barred the subsequent proceedings before the Commission. "Collateral estoppel may be applied when the issue decided in the prior adjudication is identical with the one presented in the current action, there was a final judgment on the merits in the prior adjudication, and the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication." DuPage Forklift Service, Inc. v. Material Handling Services, Inc., 195 Ill.2d 71, 77, 744 N.E.2d 845, 849 (2001).

The Respondent's argument is not persuasive because the issue that was before the Police Board is not identical to the issue that was before the Commission. The issue before the Police Board was limited to deciding whether or not the Complainant had committed the underlying misconduct for which the Respondent sought his discharge. The issue before the Commission was whether or not the Respondent had in fact disciplined the Complainant more harshly than similarly situated non-Black police officers.

A determination that the Complainant had committed the misconduct, based on the posture of his claim before the Commission, would not have precluded the Complainant from recovering under the Act. Assuming that the Complainant did commit the misconduct in question (as determined by the Police Board), as correctly pointed out by ALJ Patch, under the Illinois Human Rights Act, "[a]n employer cannot impose different standards of discipline on different races." Loyola University of Chicago v. Illinois Human Rights Commission, 149 Ill.App.3d 8, 18, 500 N.E.2d 639, 646 (1st Dist. 1986). In this case, as in Loyola, the Commission was "not concerned with the harshness of the discipline imposed [on the Complainant]... but instead [was] only concerned with whether the discipline was harsher than that imposed on comparable persons of other races." Id.

Therefore, because the issue before the Commission was not identical to the issue litigated before the Police Board, collateral estoppel did not bar the Complainant from litigating his race discrimination claim before the Commission.

B. Proof of Discharge Based on Race

The Respondent also argues that the Complainant failed to prove by a preponderance of the evidence that he was discharged based on race. In support of this argument, the Respondent states: (a) the Complainant failed to prove a *prima facie* case because he failed to identify non-Black police officers who had been treated less harshly by the Police Board for comparable acts, and (b) that even if a *prima facie* case were established, the Respondent put forth a legitimate non-discriminatory reason for discharging the Complainant, and there is no evidence of pretext.

(a) Prima Facie Case

The Respondent argues that in order to prove his *prima facie* case, the Complainant had to show that the Police Board treated non-Black officers less harshly than it did the Complainant. However, this argument fails because it overlooks the fact that the Respondent and the Police Board are two separate entities, a fact that is not disputed by the Respondent. At issue in this case was not the Police Board's behavior, but rather that of the Respondent's. Therefore, evidence concerning the Police Board's behavior would not be relevant to the Complainant's *prima facie* case against the Respondent.

(b) Legitimate reason and Pretext

The Respondent next argues that even if the Complainant did prove a *prima facie* case, it articulated a legitimate non-discriminatory reason for its actions—namely that the Complainant had violated CPD Rules 2, 8, 14 and 38—and that there was no evidence of pretext. There is no dispute that the Respondent articulated a non-discriminatory reason for its actions. However, ALJ Patch's determination that the stated reason for seeking the Complainant's discharge was pretextual was not against the manifest weight of the evidence.

ALJ Patch's determination of pretext was based both on the documentary evidence produced by the parties, as well as testimony provided by Superintendent Rodriguez concerning his reason for seeking the Complainant's discharge. Regarding Superintendent Rodriguez's testimony, ALJ Patch considered Superintendent Rodriguez's stated reasons for seeking the Complainant's discharge, which included considering the Complainant's prior disciplinary record, the nature of the Complainant's misconduct, and the Complainant's failure to attend mandatory court hearings. ALJ Patch also heard Superintendent Rodriguez testify that when he received the CR files from OPS, he reviewed the entire file, which included a summary report on the police officer. Superintendent Rodriguez testified that race could not have factored into his

decision because he had no way of knowing the race of the police officer whose discipline he had to determine.

ALJ Patch found Superintendent Rodriguez's testimony regarding his lack of awareness of the race of the police officer to be unworthy of belief because the evidence showed that the race of the police officer was stated on the front of the summary report.

ALJ Patch also determined that Superintendent Rodriguez's stated reasons for recommending the Complainant for discharge were not credible or worthy of credence in light of the documentary evidence, which demonstrated that similarly situated non-Black police officers who were subject to Superintendent Rodriguez's authority had routinely been given far more lenient discipline, even though they had engaged in comparably egregious misconduct that was in many instances as severe and violent in nature as the Complainant's misconduct. This included non-Black police officers who had unjustifiably discharged their weapons and/or pointed their weapons at civilians, with one such officer having been legally intoxicated at the time; non-Black police officers who had hit civilians about the head and face with their weapons, and beat civilians with their batons; and non-Black police officers who had choked civilians, and beat civilians with their fists.

"One method of showing pretext is to demonstrate that employees involved in misconduct of comparable seriousness were retained while the complainant was discharged." See Loyola, 149 Ill.App.3d, 19. Based on ALJ Patch's determination, which is supported by the evidence in the record, that the Respondent did not seek to discharge similarly situated non-Black police officers who had engaged in comparably egregious misconduct, the Commission concludes that ALJ Patch's finding of pretext was not against the manifest weight of the evidence.

C. Finding of Race Animus

Finally, the Respondent argues that ALJ Patch's determination is flawed because: (a) ALJ Patch erred when she excluded the Police Board's role from her analysis, and (b) her reliance on 26 CR files as representing similarly situated non-Black police officers was misplaced and should be disregarded.

(a) Police Board

The Commission finds the record supports ALJ Patch's determination that the Police Board and the Respondent are two separate entities. It is also clear from the evidence in the record that the relevant decision-maker in this case was the Respondent, via its Superintendent Rodriguez. Specifically, it was the Respondent who sought the Complainant's discharge, and it was the Respondent who exercised its discretion in the first instance to determine which police officers to recommend for discharge. It is clear that a main issue in this case centered around the manner in which the Respondent has exercised its discretion, and whether or not, in the

Complainant's case, it did so in a racially discriminatory manner. Therefore, ALJ Patch did not err when she focused her inquiry on the actions of the Respondent, and not on the Police Board.

(b) 26 Comparable Police Officers

The Respondent takes issue with ALJ Patch's reliance on 26¹ CR files as representing those non-Black police officers who were "similarly situated" to the Complainant. The Commission finds no error.

The record shows that voluminous records regarding disciplined police officers were produced by the Respondent. ALJ Patch relied on proper legal standards and criteria to cull from those police records the 26 "similarly situated" CR files.

ALJ Patch identified non-Black police officers who had engaged in similar misconduct as the Complainant; as correctly stated, the officers need not have been precisely identical to the Complainant, but rather have "comparable circumstances" that were "sufficiently parallel to permit an inference of comparability." Loyola v. Illinois Human Rights Commission, 149 Ill. App. 3d 8, 500 N.E.2d 639 (1st Dist. 1986). Part of this consideration involved determining which police officers were subject to the same standards of conduct, and the same supervisor with the ultimate decision-making authority—in this case, Police Superintendent Rodriguez. See Radue v. Kimberly-Clark Corporation, 219 F.3d 612 (7th Cir. 2000).

The Respondent contends however, that some of the 26 CR files did not contain complimentary and/or disciplinary histories, which it claims may have been considered by Superintendent Rodriguez when he was determining the appropriate discipline for those non-Black police officers. ALJ Patch articulated in the RLD that the "...officers' complimentary and disciplinary histories are included where they were present in the CR file admitted into evidence." The Respondent does not explain who, other than it, would have had this alleged missing information.

The Respondent also does not explain why it could not have examined Superintendent Rodriguez during the public hearing concerning what other factors may have influenced his decision not to discharge non-Black police officers who appeared to have engaged in misconduct that was just as egregious, if not more so, than the Complainant's. The Respondent does not otherwise point out where in the record there was evidence of additional mitigating or aggravating factors that were not considered by ALJ Patch in the course of determining which officers were "similarly situated" to the Complainant. The Respondent's argument on this point is unpersuasive.

¹ ALJ Patch notes that the 26 CR files represented 24 police officers, with two officers having acquired two CR files.

V. COMPLAINANT'S EXCEPTIONS TO THE RECOMMENDED LIABILITY DETERMINATION

Pursuant to 775 ILCS 5/8A-103 of the Illinois Human Rights Act, a party may file written exceptions to "any part of the order within 30 days of the receipt of service of the hearing officer's recommended order." 56 Ill. Adm. Code 5300.920 clarifies that the "order" that is referred in § 8A-103 of the Act is the ALJ's Recommended Order and Decision.

On June 25, 2009, the Complainant filed Exceptions to the RLD. However, the Commission is not authorized by the Act to consider exceptions to RLDs. Therefore, the Commission lacks jurisdiction to review the Complainant's Exceptions to the Recommended Liability Determination and declines to review the Complainant's Exceptions to the Recommended Liability Determination for that reason.

VI. MOTION TO RECONSIDER

The Movants asked the Commission to reconsider ALJ Patch's determination that the Complainant had waived attorney's fees and costs. The Movants argue that although the Complainant's address of record for purposes of notice included both their land mail and e-mail addresses, they were not properly served with the RLD, therefore depriving them of timely notice of when to submit their fee petitions. The Movants argue that (a) neither of them was served at their e-mail addresses of record, and (b) Movant Gunn was also not served at his land mail address, which he had provided on his initial appearance before the Commission. The Movants are correct on both points.

The record shows that the Complainant was not served at the record e-mail addresses that were included in the July 19, 2006 Order. Movant Hakeem was served at her record land address, but did not actually receive service of the RLD until the 21-day time limit for filing her fee petition had long expired, as she was in Ghana, West Africa. Movant Gunn was not served with the RLD at all. There is no evidence in the record that the Movants' failure to receive timely service of the RLD was due to their own neglect.

As a matter of due process, the Complainant cannot be said to have waived attorney's fees and costs if the evidence in the record shows that he was not properly served with the RLD by the Commission at his addresses of record. For that reason, ALJ Patch's determination that fees and costs were waived by the Complainant is against the manifest weight of the evidence in the record. The matter shall be remanded to the Administrative Law Section for further proceedings on the issue of the amount of the Complainant's attorney's fees and costs.

- STATE OF ILLINOIS)
)
 HUMAN RIGHTS COMMISSION)
- Entered this 16th day of September 2009.

Commissioner Gregory Simoncini

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

**IN THE MATTER OF:
RAYMOND HAYES,**

Complainant,

and

**CITY OF CHICAGO POLICE DEPARTMENT,
Respondent.**

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) **Charge No: 1994CA0541**
) **EEOC No: 21B93 3338**
) **ALS No: 8290**

RECOMMENDED ORDER AND DECISION

This matter is before me following the issuance of a *Recommended Liability Determination* (RLD) dated May 27, 2009, incorporated by reference herein.

FINDINGS OF FACT

1. The RLD ordered Complainant to file a petition detailing its attorney's fees and costs within 21 days of service of the RLD. The order warned that failure to submit such a petition would be seen as a waiver of attorney's fees and costs.
2. The record shows a certificate of service indicating that the RLD was served on all Parties of record by U.S. mail on May 27, 2009.
3. Complainant's attorney's fee petition was due June 22, 2009.
4. June 22, 2009 has passed and the record indicates no such petition or motion for an extension of time to file such petition has been filed.

CONCLUSION OF LAW

Complainant has waived the issue of attorney's fees and costs.

DETERMINATION

Complainant is not entitled to an award of any attorney's fees or costs.

DISCUSSION

The recommendation at #7 of the RLD recommended Respondent pay to Complainant reasonable attorney's fees and costs to be determined after Complainant files a motion for attorney's fees and costs along with a supporting affidavit within 21 days after service of the RLD. Commission rules at Sections 5300.20 and 5300.30 provide that receipt by mail is deemed to have occurred on the fourth day after mailing (unless that day is a Saturday, Sunday or legal State holiday). The record indicates a certificate of service of the RLD on the Parties dated May 27, 2009; therefore, receipt of service is deemed to have occurred June 1, 2009. Complainant's attorney's fee petition was due 21 days later, on June 22, 2009. The record indicates no such petition nor motion for an extension of time to file such petition has been filed. Thus, Complainant has waived any request for attorney's fees and costs.

RECOMMENDATION

Accordingly, it is recommended that the Commission award all relief included in the recommendation in the RLD at numbers 1 through and including 6.

July 1, 2009

HUMAN RIGHTS COMMISSION

By: _____
SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section

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) Charge No: 1994CA0541
) EEOC No: 21B93 3338
) ALS No: 8290
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This matter is before me after a public hearing on the merits of this claim. This case has a lengthy history with a public hearing on the merits lasting several days: September 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 29, and 30; and October 11, 14 and 20, 2005.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter and is named herein as an additional party of record.

Complainant alleges that he was discriminated against by Respondent, City of Chicago Police Department, on the basis of race when he was discharged from his position as police officer on March 9, 1993.

Respondent denies that it discriminated against Complainant and further maintains that Complainant was discharged for engaging in conduct violative of Chicago Police Department rules.

FINDINGS OF FACT

The following facts are stipulations or were determined to have been proven by a preponderance of the evidence. Assertions made at the public hearing that are not addressed herein were determined to be unproven or immaterial to this decision.

1. On September 3, 1993, Complainant filed a Charge of Discrimination with the Illinois Department of Human Rights. Complainant, on his own behalf, filed a Complaint with the Illinois Human Rights Commission on July 20, 1994, alleging that Respondent discriminated against him on the basis of race and age and further alleging that Respondent engaged in unlawful retaliation against him in violation of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.* Complainant subsequently voluntarily dismissed the retaliation allegation and, during the public hearing on the merits of this case, Complainant voluntarily dismissed the age claim. (Tr. Sept. 14, 2005, p.469-470).
2. Respondent filed a motion to dismiss the complaint for lack of jurisdiction on September 30, 1994. The motion was based on Respondent's contention that Complainant's Charge, filed with the Illinois Department of Human Rights, lacked a notary seal. The parties briefed the motion. Administrative Law Judge Helen Gunnarsson denied the motion on May 19, 1995, ruling that the Charge was properly under oath or affirmation in accordance with Section 5/7A-102(A) of the Act.
3. On June 16, 1995, Respondent filed a second motion to dismiss the Complaint for failure to file a timely Charge. The parties briefed the motion. On May 27, 1997, Administrative Law Judge Denise Church issued a ruling denying the motion in part and granting the motion in part. The motion to dismiss Complainant's discharge claim was denied; however, Judge Church dismissed all allegations stated in the Charge that occurred prior to 1993. In addressing

Respondent's contention that Complainant's Charge was not timely filed, Judge Church noted that Complainant's verified statement in the Charge was the only evidence establishing when Complainant was notified of the decision discharging him. Because the Charge indicated this date as March 9, 1993, and absent any affidavit or other verified evidence controverting this assertion, Judge Church found this date to be the operative date to begin the running of the statutory 180-day period within which Complainant had to file a Charge with the Illinois Department of Human Rights in order to vest the Commission with jurisdiction over the discharge claims. (See section 5/7A-102(A) of the Act.)

4. Complainant filed a motion to stay this matter on July 19, 1995, pending the outcome of an analogous claim filed in federal district court on March 7, 1995. The motion was granted by Judge Gunnarsson on August 2, 1995. On oral motion by Complainant, the stay of this matter was lifted by order of Administrative Law Judge Denise Diaz on August 5, 1996.
5. Respondent filed a verified answer to the Complaint on June 11, 1997.
6. A motion for a protective order as to specific documents and records produced by Respondent was granted pursuant to order dated April 24, 2001.
7. Respondent filed a motion for summary decision on November 13, 2001. Complainant filed a response on January 2, 2002 and Respondent filed a reply to the motion on March 27, 2002. The motion was denied by order dated January 7, 2003.
8. Complainant was born on September 12, 1947, and his race is Black. Complainant was appointed to the Chicago Police Department (CPD) as a police officer on October 18, 1976.
9. September 12, 1991 was Complainant's birthday and he had a scheduled day off from work. Although the day was a scheduled off day for him, he was required to

attend traffic court that day based on a CPD traffic court procedure that had assigned him to traffic court on that day. While driving in his personal automobile on the way to traffic court that morning, Complainant became involved in an incident with Ikemefuna Okoye (Okoye), a taxi driver, in downtown Chicago. Complainant ordered Okoye to stop his taxicab. Complainant then exited his car, opened Okoye's car door and ordered Okoye out of his taxicab. During the incident, Complainant drew his weapon, arrested Okoye and transported Okoye to the First District CPD station on 1100 South State Street in downtown Chicago.

10. The conduct of CPD police officers is governed by the Rules and Regulations of the CPD, published by the Police Board. The Rules and Regulations have been in effect from 1973 to the present.
11. The Office of Professional Standards (OPS) is a City of Chicago entity that investigates allegations of excessive force by CPD officers and makes recommendations of discipline. When allegations of excessive force are made against a CPD officer, OPS opens a Complaint Registry (CR) file, which contains the allegations, and which will eventually contain the interview reports and other investigative reports and materials compiled by OPS during the investigation of the allegations against the police officer. The CR file will also contain OPS's findings as to whether the allegations were determined to be sustained or not sustained and OPS's disciplinary recommendation on the sustained findings.
12. Gaye Shines (Shines) was the Chief Administrator of OPS from September 1991 until 1998. As Chief Administrator, Shines oversaw the investigations that were performed by OPS investigators. OPS investigators are civilian members of the OPS staff who conduct investigations into allegations of the use of excessive

force and police shootings by CPD police officers. Shines routinely reviewed all investigations where the investigator recommended that the allegations be sustained.

13. Once a CR file was opened alleging that a CPD officer engaged in excessive force or a weapons violation, the OPS investigation procedure at the relevant time was as follows: An OPS civilian investigator was assigned to investigate the particular charges of excessive force or weapons violation; the investigator conducted an investigation and completed interview reports, other reports and an investigation summary report; if the investigator sustained findings of excessive force, the investigator submitted the report and the finding to his OPS supervisor, who reviewed it; the investigator and the supervisor collaborated on a disciplinary recommendation; the recommendation was included in the CR file and the CR file was forwarded to OPS Chief Administrator Shines; Shines reviewed the CR file, including the investigative summary report, the disciplinary recommendation, and the police officer's past disciplinary and complimentary history, and made a decision whether or not to concur with the findings and disciplinary recommendation. Shines made a disciplinary recommendation on behalf of OPS and forwarded the CR file, which included the OPS disciplinary recommendation, to the Office of the Police Superintendent.
14. When the Office of the Police Superintendent receives a CR file and the disciplinary recommendation from OPS, the findings and recommendation are forwarded to the Police Superintendent's legal adviser for review and then passed on to the Police Superintendent for his review. The Police Superintendent then reviews the CR file, including the findings and the recommendations. The Police Superintendent has the total discretion to accept, not accept, or adjust the recommended OPS penalty, including a

recommendation of discharge. (Tr. Sept. 14, 2005, p. 420, 442). If the Police Superintendent utilizes his discretion to adjust the recommended penalty, one of the penalties he can impose includes a suspension; he may also increase or decrease the time duration of an OPS recommended suspension. (Tr. Sept. 14, 2005 p. 442, 1-11). However, if the Police Superintendent imposes a suspension of more than 30 days, the CR file must be referred to the Police Board for a due process hearing and final determination as to whether the officer is guilty of committing the violations that led to the penalty imposed by the Superintendent (Tr. Sept. 14, 2005, p.442, 23-24, p.443).

15. If OPS makes a recommendation of discharge pursuant to its investigation and sustained findings of a CR file and the Police Superintendent approves the recommendation, the Police Superintendent's recommendation for discharge and the CR file are forwarded to the Police Board, which holds a hearing and makes a determination as to whether the officer is guilty of committing the violations that led to the discharge decision. (Tr. Sept. 14, 2005, p.443).
16. Once the Police Board holds a hearing and makes a determination that an officer is guilty of the violations which led to the discharge decision approved by the Police Superintendent, the Police Superintendent cannot adjust or overturn the determination and the discharge decision must be imposed. (Tr. Sept. 14, 2005, p. 443, 24; p.444, 1-5).
17. At the relevant time, The Municipal Code of the City of Chicago at section 2-74-080 had a written policy prohibiting discrimination against any employee or applicant based on race, age and other factors.
18. The Police Superintendent at the time Complainant was discharged was Matthew Rodriguez, also referred to as Matt Rodriguez (Rodriguez). Rodriguez was

Police Superintendent of the CPD from April 13, 1992 until December 1, 1997, when he retired. (Tr. Sept. 14, 2005, p. 436, 16-21).

19. The same day of the incident between Complainant and cab driver Okoye, Joe Hernandez (Hernandez), a private citizen who, at the time, worked for the City of Chicago Corporation Counsel as a paralegal, telephoned OPS. Hernandez reported that he had observed an interaction between Complainant and a cab driver in downtown Chicago that morning. Approximately 25 minutes after Hernandez's call, another private citizen, Jasmine Tuan, also contacted OPS to report that she had witnessed an incident between Complainant and a cab driver in downtown Chicago that morning while she was a passenger in a separate taxicab driven by cab driver Edmund Oparah.
20. On this information, OPS opened an investigative file, Complaint Register (CR) number 187285, and named Complainant as an officer accused of excessive force and wrongdoing stemming from Complainant's alleged conduct in his interaction with Okoye on the morning of September 12, 1991, in downtown Chicago. The investigation was assigned to one of OPS's civilian investigators, Andrew Palahniuk, on September 13, 1991.
21. Palahniuk conducted an investigation, which included interviewing Complainant and several witnesses, including Hernandez, Tuan and Oparah. Palahniuk also took a statement from Okoye with Okoye's attorney present, as part of the investigation. Palahniuk prepared a summary investigative report, dated with two dates, November 27, 1991, and December 3, 1991, which included his investigative summary, evidence and attachments, and findings. Palahniuk concluded that Complainant had engaged in excessive force during the September 12, 1991, incident with Okoye. Palahniuk made a finding of *sustained* as to allegations of violation by Complainant of CPD Rules 38 and 14,

and two violations of Rule 8. Palahniuk found *not sustained* and *unfounded* as to other allegations of wrongdoing during the incident. Palahniuk signed the report and Palahniuk's supervisor, Ann Lombardo, also signed the report. (C's Ex 17). The CR file number 187285, including Palahniuk's report, was forwarded to OPS Chief Administrator Shines.

22. Shines made a recommendation that Complainant be discharged based on her review of the CR file, the report, and the sustained findings of the violations. Shines signed the *Recommendation for Separation* form and submitted the CR file and *Recommendation for Separation* form to the then Superintendent of Police, Rodriguez. (Tr. Sept. 14, 2005, 14-18). Rodriguez approved and signed the *Recommendation for Separation* form and sought to impose discharge on Complainant. (Tr. Sept. 14, 2005, p.448, 24; p. 449, 2). The *Recommendation for Separation* form showed that Complainant was shown to have violated CPD Rules 2, two counts of 8, 14 and 38. (C's Ex 40).
23. At the point when Rodriguez received the OPS recommendation for discharge, he had the total discretion to approve or disapprove the recommendation for discharge or to change the discipline recommendation. (Tr. Sept. 14, 2005, 20-24).
24. In approving the discharge recommendation, Rodriguez reviewed Complainant's CR file, which included the investigative summary report, other investigative reports, and Complainant's disciplinary history and complimentary history for the prior five years. (Tr. Sept. 14, 2005, p. 449, 12-14; p. 454, 20-24; p.455, 1-4).
25. Pursuant to his approval of the OPS recommendation of discharge for conduct stemming from the investigation of Complainant's CR file, Rodriguez filed his recommendation for discharge with the Police Board on or around May 28, 1992.

26. Complainant's 5-year previous complimentary history (Jt Ex 9), dated June 30, 1992, indicated that Complainant received 2 Department Commendations, 62 Honorable Mentions, 4 Complimentary Letters and 1 Unit Meritorious Performance Award.
27. Complainant's disciplinary history dated November 27, 1991 (Rs Ex 6) , indicated Complainant's 5-year previous disciplinary history as: May 21, 89 - 5 day suspension, conduct unbecoming (off duty), altercation/disturbance neighbor; October 27, 1989- 2 Day suspension, neglect of duty/conduct unbecoming; October 2, 1990 - work 1 day w/o pay, fail to appear in ct or not, supvr of inability; Feb 6, 1991- 2 days off w/o pay, fail to appear in ct or not. supvr of inability; Feb 19, 1991- no action taken, fail to appear in ct or not. supvr of inability; March 5, 1991- 2 days off w/o pay, fail to appear in ct or not. supvr of inability.
28. The Police Board held a hearing on the charges stemming from Complainant's CR file before Hearing Officer Thomas E. Johnson on July 30, 1992 and August 19, 1992. The Police Board read and reviewed the transcript of the hearings and heard an oral report by Hearing Officer Johnson, before issuing its decision dated March 5, 1993, to discharge Complainant from the CPD.
29. The Police Board was a civilian oversight panel that had oversight responsibilities relative to the CPD. It was a separate entity from the CPD and was composed of nine members who were appointed by the Mayor of the City of Chicago with the approval of the Chicago City Council. (Tr. Sept. 20, 2005, pp.1341, 1343). The Police Board had its own budget and was outside the chain of command of the Superintendent of Police. (Tr. Sept. 20, 2005, p.1341).The Police Board had jurisdiction over only two categories of police discipline: (1) If a police officer is facing a suspension of from 6-30 days, the police officer has the option of requesting that the matter be sent to the Police Board for a suspension review,

which is a paper review with no live testimony. The burden is on the police officer to convince the Police Board that the suspension should not be imposed. (Tr. Sept. 20, 2005 p.1353-1354). This procedure is referred to as a suspension review file. (2) When the Police Superintendent seeks a suspension in excess of 30 days or a discharge, the Police Board initiates a Police Board case, which is an administrative law adversarial proceeding. (Sept. 20, 2005 p. 1354). The Police Board is responsible for holding a due-process hearing pursuant to a Police Board case. During the hearing, the Police Superintendent is represented by an assistant corporation counsel and the police officer has the right to be represented by counsel. The assistant corporation counsel will call witnesses and examine them. The police officer has the right to pre-hearing discovery, to testify, to call witnesses and to cross-examine the witnesses called by the assistant corporation counsel. The police officer may testify on his own behalf and can introduce evidence. The Police Board has subpoena power which may be used to summon witnesses or evidence on behalf of the parties. An administrative hearing officer, who is appointed by the Police Board, presides over the hearing. (Sept. 20, 2005, p. 1350, 1355-1357).

30. According to Complainant's verified Charge filed with the Department of Human Rights, and pursuant to the May 27, 1997 order of Judge Denise Church, Complainant was notified of the Police Board decision discharging him on March 9, 2009. (See Finding of Fact Number 3 above).
31. During the time period from 1990-1995, several similarly situated non-Black police officers were accused of excessive force misconduct and were assigned a CR file, the allegations were investigated by OPS and OPS made findings of sustained that the police officers engaged in various excessive force misconduct

violations; however, none of the identified comparables were discharged and all received more favorable discipline.

32. Respondent's articulated reasons for discharging Complainant were pretextual.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved Party" as defined by Section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (Act).
2. Respondent is an "employer" as defined by Section 1-101 (B) of the Act.
3. The Illinois Human Rights Commission has jurisdiction over the parties and subject matter of this action.
4. Complainant presented a *prima facie* case of race discrimination.
5. Respondent articulated a legitimate, non-discriminatory reason for its decision to discharge Complainant.

DETERMINATION

Complainant has established, by a preponderance of the evidence that Respondent unlawfully discriminated against him on the basis of race when it discharged him for violating CPD rules.

DISCUSSION

Jurisdictional Issues

Respondent filed a motion to dismiss the complaint for lack of jurisdiction on September 30, 1994. The motion was based on Respondent's contention that Complainant's Charge of Discrimination (Charge), filed with the Illinois Department of Human Rights, lacked a notary seal. The parties briefed the motion. Administrative Law Judge Helen Gunnarsson denied the motion on May 19, 1995, ruling that the Charge was properly under oath or affirmation in accordance with Section 5/7A-102(A) of the Act. Judge Gunnarsson's ruling is incorporated into this recommended order.

On June 16, 1995, Respondent filed a second motion to dismiss the complaint for failure to file a timely Charge. The parties briefed the motion. On May 27, 1997, Administrative Law Judge Denise Church issued a ruling denying the motion in part and granting the motion in part. Judge Church denied Respondent's motion to dismiss Complainant's discharge claim; however, Judge Church granted the motion to dismiss all allegations stated in the Charge that occurred prior to 1993. In addressing Respondent's contention that Complainant's Charge was not timely filed, Judge Church concluded that Complainant's verified statement in the Charge was the only evidence establishing when Complainant was notified of the decision discharging him. Because the Charge indicated this date as March 9, 1993, and the record presented no other verified evidence controverting this assertion, Judge Church found this date to be the operative date to begin the running of the statutory 180-day period within which Complainant had to file a Charge with the Illinois Department of Human Rights in order to vest the Commission with jurisdiction. (See section 5/7A-102(A) of the Act.) Based on her ruling, Complainant's September 3, 1993, Charge filing was ruled to be within the 180-day period of the March 9, 1993 notification of discharge. Judge Church's ruling is incorporated into this recommended order.

Collateral Estoppel and Res Judicata

In 2003, Respondent filed separate motions to dismiss this Complaint based on the legal theories of *collateral estoppel* and *res judicata*. I denied both motions by order of September 15, 2003. That ruling is incorporated into this recommended order.

Background

Complainant was born on September 12, 1947, and his race is Black. Complainant was appointed to the Chicago Police Department (CPD) as a police officer on October 18, 1976.

September 12, 1991 was Complainant's birthday and he had a scheduled day off from work. Although the day was a scheduled off day for him, he was required to attend traffic court that day based on a CPD traffic court procedure that had assigned him to traffic court on that day. While driving in his personal automobile on the way to traffic court that morning, Complainant became involved in an incident with Ikemefuna Okoye (Okoye), a taxi driver, in downtown Chicago. Complainant ordered Okoye to stop his taxicab. Complainant then exited his car, opened Okoye's car door and ordered Okoye out of his taxicab. During the incident, Complainant drew his weapon, arrested Okoye and transported Okoye to the First District CPD station on 1100 South State Street in downtown Chicago.

The Office of Professional Standards

The conduct of CPD police officers is governed by the Rules and Regulations of the CPD, published by the Police Board. (The role of the Police Board will be explained later in this discussion.) The Rules and Regulations of the CPD have been in effect from 1973 to the present.

The Office of Professional Standards (OPS) is a City of Chicago entity that investigates allegations of misconduct and excessive force by CPD officers and makes recommendations of discipline. When allegations of excessive force are made against a CPD officer, OPS opens a Complaint Registry (CR) file, which contains the allegations, and which will eventually contain the interview reports and other investigative reports and materials compiled by OPS during the investigation of the allegations against the police officer. The CR file will also contain OPS's findings as to whether the allegations were determined to be sustained or not sustained and OPS's disciplinary recommendation on the sustained findings.

Allegations of misconduct and excessive force against Complainant

The same day of the incident between Complainant and Okoye, Joe Hernandez (Hernandez), a private citizen who worked for the City of Chicago Corporation Counsel as a paralegal at the time, telephoned OPS. Hernandez reported that he had observed an interaction between a person identifying himself as a police officer and a taxicab driver in downtown Chicago that morning. Approximately 25 minutes after Hernandez's telephone call, another private citizen, Jasmine Tuan, also contacted OPS to report that she had witnessed an incident between a possible police officer and a taxicab driver in downtown Chicago that morning while she was a passenger in a separate taxicab driven by cab driver Edmund Oparah.

OPS determined that the parties who had engaged in the altercation reported by Hernandez and Tuan were Complainant and Okoye and opened an investigative file, Complaint Register (CR) number 187285, and named Complainant as an officer accused of misconduct stemming from Complainant's alleged conduct in his interaction with Okoye on the morning of September 12, 1991, in downtown Chicago. The investigation was assigned to one of OPS's civilian investigators, Andrew Palahniuk, on September 13, 1991.

Palahniuk conducted an investigation, which included interviewing Complainant and several witnesses, including Hernandez, Tuan and Oparah. Palahniuk also took a statement from Okoye with Okoye's attorney present, as part of the investigation.

Palahniuk prepared a summary investigative report, dated with two dates, November 27, 1991 and December 3, 1991, which included his investigative summary, evidence and attachments, and findings. Palahniuk concluded that Complainant had engaged in excessive force and misconduct during the September 12, 1991 incident with Okoye. Palahniuk made a finding of *sustained* as to allegations of violation by

Complainant of CPD Rules 38, 14, and two counts of 8. Palahniuk found *not sustained* and *unfounded* as to other allegations of wrongdoing during the incident. Palahniuk signed the report and Palahniuk's supervisor, Ann Lombardo, also signed the report. (C's Ex 17).

Complainant's CR file, which included Palahniuk's report and other materials related to the investigation, was forwarded to the Chief Administrator, Gayle Shines (Shines). Shines made a recommendation that Complainant be discharged based on her review of the CR file, the report, and the sustained findings of the violations. Shines signed and submitted a *Recommendation for Separation* form to the Superintendent of Police, Matthew Rodriguez (Rodriguez). Rodriguez signed his approval to the recommendation for separation on the *Recommendation for Separation* form. (C's Ex 40). After Rodriguez approved the discharge recommendation, he was required to and did submit the recommendation to the Police Board.

It is noted that the *Recommendation for Separation* form includes a violation of CPD Rule 2 in addition to the violations of Rules 8, 14 and 38. Palahniuk's summary report of sustained violations signed by himself and his supervisor, Lombardo, does not include a sustained finding for a CPD Rule 2 violation (C's Ex 17) and there is nothing in the record that explains the discrepancy.

Police Board

Mark Iris (Iris) was the Executive Director of the Chicago Police Board beginning January 1984. Although he retired in May, 2004, he continued to serve as executive director until November, 2004, pursuant to a personal services contract. (Tr. Sept. 20, 2005, p. 1340). Iris testified as to the function and procedures of the Police Board during the relevant time. The Police Board was a civilian oversight panel that had oversight responsibilities relative to the CPD. It was a separate entity from the CPD and was composed of nine members who were appointed by the Mayor of the City of Chicago

with the approval of the Chicago City Council. (Tr. Sept. 20, 2005, pp.1341, 1343). The Police Board had its own budget and was outside the chain of command of the Superintendent of Police. (Tr. Sept. 20, 2005, p.1341).

The Police Board had jurisdiction over only two categories of police discipline: (1) If a police officer was facing a suspension of from 6-30 days, the police officer had the option of requesting that the matter be sent to the Police Board for a suspension review, which was a paper review with no live testimony. The burden was on the police officer to convince the Police Board that the suspension should not be imposed. (Tr. Sept. 20, 2005 pp.1353-1354). This procedure is referred to as a suspension review file. (2) When the Police Superintendent sought a suspension in excess of 30 days or a discharge, the Police Board would initiate a Police Board case, an administrative law adversarial proceeding. (Sept. 20, 2005 p. 1354).

The Police Board is responsible for holding a due-process hearing pursuant to a Police Board case. During the hearing, the Police Superintendent is represented by an assistant corporation counsel and the police officer has the right to be represented by counsel. The assistant corporation counsel will call witnesses and examine them. The police officer has the right to pre-hearing discovery, to testify, to call witnesses and to cross-examine the witnesses called by the assistant corporation counsel. The police officer may testify on his own behalf and can introduce evidence. The Police Board has subpoena power which may be used to summon witnesses or evidence on behalf of the parties. An administrative hearing officer, who is appointed by the Police Board, presides over the hearing. (Sept. 20, 2005, pp. 1350, 1355-1357).

At the conclusion of the hearing, the hearing record and relevant materials are disseminated to the members of the Police Board, who review the record and subsequently meet at an executive session of the Police Board, which includes Police Board members, the hearing officer, the executive director of the Police Board, and the

secretary for the executive director. (Tr. Sept. 20, 2005 pp.1369-1372). Police Board members decide whether the police officer is guilty or not guilty of the violations underlying the Police Superintendent's recommended discharge action. The standard of guilt is by a preponderance of the evidence. (Tr. Sept. 20, 2005, p. 1392). Only Police Board members vote on the guilty or non-guilty determination pursuant to the Police Board hearing. Neither the executive director nor the hearing officer has a vote. (Tr. Sept. 20, 2005, p. 1373). If the Police Board determines that the police officer is guilty, it then determines a penalty. Again, only Police Board members vote on a penalty, not the executive director or the hearing officer. Once a penalty determination is made, notification of the findings and decision of the Police Board is sent to the Police Superintendent for appropriate follow-up action. (Tr. Sept. 20, 2005, pp. 1373-1375).

After the Police Board makes a determination, the Police Superintendent and the police officer have the right to appeal the decision to the county circuit court. Review of the circuit court decision may be appealed to the Illinois Appellate Court and the parties may petition the Illinois Supreme Court for review of the appellate court decision. (Tr. Sept. 20, 2005, p. 1376).

While I find it necessary to an understanding of the CPD disciplinary process to explain Police Board procedures and the role of the Police Board in the CPD disciplinary scheme, I do not find the Police Board proceedings relevant to the issue of alleged race discrimination presented here. This conclusion is based on an analysis of the role of the Police Board, which only has jurisdiction over non-hearing 6-30 day suspension review cases and due-process hearing Police Board cases where the Police Superintendent seeks either a disciplinary suspension of more than 30 days or a discharge. To that extent, in Police Board hearing cases, the role of the Police Board is primarily limited to conducting a due process hearing to determine whether the police officer engaged in the alleged CPD rule violations.

According to CPD disciplinary procedure, at the point when the Police Superintendent receives notice of OPS sustained finding of rule violations and OPS recommendation for discipline, the Police Superintendent has the total discretion to approve, disapprove or adjust the OPS disciplinary recommendation. Since the OPS disciplinary recommendation is non-binding and subject to the discretion of the Police Superintendent (Tr. Sept. 20, 2005 p.1391), it is this discretionary decision at this point in the process that is the relevant decision for this analysis, which merely seeks to determine whether Complainant was disciplined in a harsher manner than similarly situated officers of a different race. All procedures subsequent to the Police Superintendent's decision are related to the implementation of the Superintendent's decision.

Prima Facie Analysis

In analyzing employment discrimination actions under the Act, the three-step analysis as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 93 S.Ct. 1817 (1973) is applied. Initially, the employee has the burden of proving a *prima facie* case of unlawful discrimination by a preponderance of the evidence. This creates a rebuttable presumption that the employer engaged in unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), adopted by the Illinois Supreme Court in *Zaderaka v. Illinois Human Rights Commission*, 131 Ill.2d 172, 545 N.E.2d 674 (1989). The employer must then clearly set forth a legitimate, non-discriminatory reason for its employment decision in order to successfully rebut the presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, *supra*. The employee must then prove by a preponderance of the evidence that the legitimate reason offered by the employer was not the true reason underlying its employment decision. This burden merges with the employee's ultimate burden of proving whether the employer unlawfully discriminated. *Texas Dept. of Community*

Affairs v. Burdine, supra; Village of Oak Lawn v Human Rights Commission, 133 Ill App 3d 221, 88 Ill Dec. 507, 478 NE2d 1115, (1985).

A *prima facie* case of discrimination based on race may be established by showing that similarly situated employees of a different race were treated more favorably. In such an analysis, the harshness of the discipline imposed in itself is not the concern; rather, the concern is as to whether the discipline was harsher than that imposed on comparable persons of other races. *Loyola University of Chicago v Illinois Human Rights Commission*, 149 Ill.App.3d 8, 500 NE2d 639, (1st Dist. 1986). An employer cannot impose different standards of discipline on different races. *Loyola, supra*.

Similarly Situated

Throughout the pre-hearing discovery phase of this litigation, Respondent consistently maintained that Complainant could not establish a *prima facie* case because no similarly situated comparables existed. Respondent based this argument on its contention that the case of each police officer charged with misconduct or excessive force violations was different and stood on its own particular facts. Complainant rejected this argument, maintaining that all officers who were charged with engaging in similar misconduct as Complainant and whose charges were found *sustained* by OPS were similarly situated.

While Respondent's argument is untenable, Complainant's definition of *similarly situated* is well supported by legal authority. A similarly situated comparison requires that the comparables engaged in similar misconduct. In such a comparison, the focus is on the similarity of the misconduct and the employees' work records. "Precise equivalence," however, is not required. Comparable circumstances need only be sufficiently parallel to permit an inference of comparability. *Loyola v Illinois Human Rights Commission*, 149 Ill

App 3d 8, 500 NE2d 639 (1st Dist 1986), citing *McDonald v Santa Fe Trail Transportation Co.*, 427 US 273, 96 S Ct 2574 (1976).

However, an appropriate definition for similarly situated based on the facts in this case does not stop there. In determining whether employees are similarly situated, all relevant factors must be considered depending on the context of the case. In a disciplinary case, such an analysis generally entails a showing that the employees dealt with the same supervisor, were subject to the same standards and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. *Radue v Kimberly-Clark Corporation*, 219 F3d 612 (7th Cir 2000).

With this guideline in mind, I find a second common factor relevant in characterizing the identified comparables as similarly situated in this matter. In making this determination, I recognize that Respondent's disciplinary process specific to this case has two levels: First, OPS makes a non-binding recommendation of discipline based on its investigation and determination of sustained findings of violations of CPD Rules; Second, on OPS's determination of sustained findings of violations of CPD Rules, the Police Superintendent approves, disapproves or adjusts the recommended discipline at his discretion and takes further steps in accordance with CPD disciplinary procedures to implement his recommended discipline. Considering this disciplinary process, I find a reasonable analysis of comparability to require that the disciplinary decision maker who possessed the authority and discretion to approve, not approve, or adjust a disciplinary recommendation – in this case, Superintendent Rodriguez – must be common to Complainant and the identified comparable police officers.

While specifically recognized as a relevant factor in the *Radue* analysis, this factor is also consistent with well established federal and Commission principles used in analyzing whether employees are similarly situated. The Commission has held that in

order for an employee to be a comparative, complainant must show that the same person made the relevant employment decision. *Welch v Supreme Court of Illinois and Appellate Court of Illinois*, IHRC, S-10644, May 19, 2006. A proffered comparative subject to the authority of a different decision maker is not sufficiently similar. *Mayhew and St. of Ill. Dept. of Public Aid*, IHRC 5318, May 28, 1996. Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a *prima facie* case of discrimination for the simple reason that different supervisors may exercise their discretion differently. *Radue, supra*. Different decisions, concerning different employees, made by different supervisors, sufficiently account for any disparity in treatment, thereby preventing an inference of discrimination. *Snipes v Illinois Dept. of Corrections*, 291 F3d 463 (7th Cir 2002).

Finally, it was necessary to impose yet a third factor in this similarly situated analysis. The establishment of a reasonable time frame within which the comparables engaged in misconduct or excessive force violations was appropriate considering the circumstances of this case. I found this imposition prudent based on information gathered during the prehearing discovery phase of this litigation that led me to believe that an unmanageable number of comparables' CR files would be potentially involved absent the constraint of a reasonable time frame.

I find this time-frame constraint consistent with the guidelines in *Radue, supra*, which state that relevant factors in a similarly situated analysis include a showing that comparables were subject to the same standards and engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. Pursuant to this guideline, I considered that the application, interpretation and implementation of CPD Rules may have reasonably changed over time; thus, a reasonable time-frame was warranted. Pursuant to my order in the record dated December 4, 2000, identified comparables were

determined to be those police officers who engaged in similar violations during the time frame from 1990-1995.

To summarize the operative similarly situated definition used to analyze comparables in this case, identified comparables are those non-Black police officers who were determined by OPS to have engaged in similar misconduct violations during the time period from 1990-1995 and whose disciplinary recommendation was approved by Rodriguez.

Complainant's *prima facie* case

To satisfy his *prima facie* burden, Complainant, whose race is Black, identified 229 police officers, who are White or Hispanic, who engaged in similar misconduct, yet were disciplined more favorably in that each was suspended for varying periods of time and none was discharged. Upon review of the CR files of the 229 police officers, it was necessary to pare this number down substantially as most did not meet the three-pronged similarly situated definition as previously discussed. Specifically, those rejected were deemed not similarly situated because they did not meet at least one of the four following criteria: (1) the misconduct occurred outside of the operative time period from 1990-1995; (2) the misconduct was not sufficiently similar; (3) another superintendent other than Rodriguez approved the discipline; and/or (4) the documents in the CR file were too ambiguous or incomplete to allow for an objective analysis.

After this sifting process, the record supports that a total of 26 police officers met the operative definition of similarly situated; therefore, Complainant has satisfied his burden of proving a *prima facie* case.

Since Complainant has met his *prima facie* burden, Respondent must now set forth a legitimate, non-discriminatory reason for its employment decision in order to successfully rebut the presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine, supra*.

Respondent's articulation

Respondent maintains that Complainant was discharged for legitimate non-discriminatory reasons in that Complainant was charged with and found by OPS to have violated CPD Rules 2, two counts of 8, 14, and 38. Respondent has successfully articulated a legitimate non-discriminatory reason for its discharge decision.

Complainant's showing of pretext

Next, Complainant must show that Respondent's articulated reason for discharging him was pretextual. Complainant attempts to show pretext by demonstrating that other police officers involved in misconduct of comparable seriousness were not discharged and were subjected to less serious discipline, such as suspension. *Loyola, supra*, citing *Donaldson v Taylor Products Div. of Tecumseh Products Co.* 620 F2d 155 (7th Cir 1980).

The record supports that officers identified in 26 CR files met the definition of similarly situated in that each engaged in misconduct similar to Complainant's as demonstrated by the specific CPD Rule violations and summary of sustained allegations pursuant to an OPS investigation and determination; however, Rodriguez did not impose discharge and instead imposed discipline in the form of suspensions or reprimands. The violations of the officers in the 26 separate disciplinary CR files are listed below for comparison. I note that the 26 cited CR files are represented by only 24 different police officers, as Police Officers Manuel Acevedo and David Kappus each have two separate CR files listed for separate incidences of allegations of misconduct. Acevedo's and Kappus's star numbers are included as evidence that the CR files refer to the same police officer.

The police officers' 5-year previous complimentary and disciplinary histories are indicated if such records were included in the CR file admitted into evidence.

In order to make a proper comparison, following are the specific CPD Rules and summary of the specific conduct Complainant was found to have violated in the OPS

Recommendation for Separation:

Rule 2- Violation of any law or ordinance: while off duty, brought discredit upon the Department and impeded the Department's efforts to achieve its policy and goals by his overall actions and conduct in that he unnecessarily displayed his weapon by pointing it at Ikemefuna Okoye, struck him on the back of the head with the butt of his gun, and slapped him in the face after he was handcuffed.

Rule 8- Disrespect to or maltreatment of any person, while on or off duty: while off duty, maltreated Ikemefuna Okoye by striking him on the back of the head with the butt of [sic] his gun.

Rule 8- Disrespect to or maltreatment of any person, while on or off duty: while off duty, maltreated Ikemefuna Okoye in that he continually slapped him in the face after he was handcuffed.

Rule 14- Making a false report, written or oral. On November 24, 1991, gave false information to the Office of Professional Standards in his statement relative to the incident of September 12, 1991 at Lake and Wacker.

Rule 38-Unlawful or unnecessary use or display of a weapon: while off duty, pointed his weapon at Ikemefuna Okoye without justification.

Rodriguez testified that he reviewed Complainant's 5-year previous disciplinary and complimentary history when making the discharge decision (Tr. Sept. 14, 2005, p. 452, 458). Complainant's complimentary and disciplinary history is as follows:

Complainant's complimentary history included 6 honorable mentions, 4 complimentary letters, 2 Department commendations, and 1 unit meritorious performance award.

Complainant's disciplinary history included: 5-day suspension from February 9, 1991 to February 10, 1991, for conduct unbecoming (off duty) altercation/disturbance with a neighbor on May 21, 1989; 2-day suspension from August 27, 1990 to August 28, 1990 for neglect of duty/conduct unbecoming, occurring October 27, 1989; 1-day suspension for failing to appear in court or notifying supervisor of inability on October 2, 1990; 2-day suspension from May 9, 1991 to May 10, 1991, for failing to appear in court or notify supervisor of inability on February 6, 1991; No discipline for failing to appear in court or notify supervisor of inability on February 19, 1991; 2-day suspension from May 23, 1991 unto May 24, 1991 for failure to appear in court or notify supervisor of inability on March 5, 1991; 3-day suspension from October 27, 1991 to October 28, 1991 for failing to respond to radio call by dispatcher on June 5, 1991.

Comparables

The specific misconduct and imposed discipline of the 26 identified comparable police officers presented in this record follows. The officers' complimentary and disciplinary histories are included where they were present in the CR file admitted into evidence. Note that in order to preserve the integrity of the violation, I have used the abbreviations included in the CR file.

1. Manuel Acevedo, Hispanic (Star #11783)- OPS determined that he violated CPD Rules 2, 8, 9, and 15 in that on September 29, 1991, while off duty, he was intoxicated and did engage in an unjustified verbal altercation with a male individual and threatened to kill the individual and burn down his restaurant; he did maltreat the male individual by pushing him and punching him in the face; he brought discredit upon the Department by his actions and conduct in a restaurant in that he refused to desist from playing a personal radio while a band was performing when requested to do so by the owner of the establishment. OPS recommended a 10-day suspension. Rodriguez decreased the recommendation and approved a 5-day suspension. Acevedo's 5-year Complimentary and Disciplinary history included: (No Complimentary history included in CR file). Disciplinary - April 2, 1991, reprimand for failure to comply with the Department's uniform stands; 5-day suspension on February 18, 1988, for misuse of Department equipment/supplies.

2. Manuel Acevedo, Hispanic- (Star #11783) - OPS determined that he violated CPD Rules 2 and 8 (two counts), in that on April 26, 1993, while off duty, he did maltreat a male youth by pulling him out of a vehicle, throwing him against the vehicle and punching him in the face; did maltreat another male youth by striking him in the face and throwing him against a car; brought discredit upon the Department by searching a youth's vehicle without justification and failing to identify himself as a police officer. OPS recommended a 15-day suspension. Rodriguez decreased the recommendation and approved a 10-day suspension. Acevedo's 5-year Complimentary and Disciplinary history included: Complimentary - No Special Awards, 1 Department Commendation, 18 Honorable Mentions, 6 Complimentary Letters. Disciplinary - 2-day suspension for operation/personnel violation on April 23, 1992; reprimand on August 12, 1992 for failure to appear in court or notify supervisor of inability.

3. Mark Allen, White - OPS determined that he violated CPD Rule 6 in that on January 1, 1991; he violated the provisions of General Order 86-8, Section IV-E in that he fired at a fleeing vehicle without

justification. OPS recommended a 10-day suspension. Rodriguez decreased the recommendation and approved a 5-day suspension. (No complimentary or disciplinary history in CR file).

4. Scott Berry, White - OPS determined he violated CPD Rule 8 on August 5, 1994 in that, while on duty, he did maltreat a male individual during the course of an arrest by pushing him to the ground and striking him on the face with his weapon. OPS recommended a 5-day suspension. Rodriguez decreased the recommendation and approved a 4- day suspension. (No complimentary or disciplinary history in CR file).

5. Robert Brancher, White- OPS determined that he violated CPD Rules 14, 29 and 38 in that on November 16, 1993, he made a false report stating that he was too ill to attend court and failed to appear in court; and on October 24, 1993, while in his private vehicle, he pointed a gun at two male individuals in a threatening manner while on the public way. OPS recommended an 8-day suspension. Rodriguez decreased the recommendation and approved a 3-day suspension. (No complimentary or disciplinary history in CR file).

6. Xavier Castro, Hispanic - OPS determined that he violated CPD Rule 8, in that on December 19, 1990, while in an interview room at Area 6, he did maltreat a male individual when he beat him about the head and face. OPS recommended a 15-day suspension. Rodriguez decreased the recommendation and approved a 5-day suspension. Castro's 5-year Complimentary and Disciplinary History included: Complimentary - 1 Special Award, 4 Department Commendations, 11 Honorable Mentions, 10 Complimentary Letters. (No disciplinary history in CR file).

7. John Chavez, Hispanic - OPS determined that he violated CPD Rules 6, 8, 10 and 14, in that, on May 4, 1994, he did show disrespect to and maltreat a male individual when he held him while another sworn Department member sprayed his face with mace; placed a male individual in custody by detaining him and placing him inside a police vehicle, then transporting him to another location, where he released him in violation of General Order 92-5; was inattentive to duty in that he had knowledge of another sworn Department member's discharge of mace and failed to report the incident; and on May 20, 1994, he gave a false statement to OPS. OPS recommended a 2-day suspension. Rodriguez approved. Chavez's 5-year Complimentary and Disciplinary History included: Complimentary - No Special Awards, 5 Department Commendations, 91 Honorable Mentions, 7 Complimentary Letters. Disciplinary – Reprimand on Dec. 2, 1997 for failure to appear in court or notify supervisor of inability.

8. Robert Clemens, White - OPS determined that he violated CPD Rule 8, in that on December 19, 1990, while in an interview room at Area 6, he did maltreat a male individual when he beat him about the head and face. OPS recommended a 10-day suspension. Rodriguez decreased the recommendation and approved a 5-day suspension.

Clemens' 5-year Complimentary and Disciplinary History included: Complimentary - No Special Awards, 2 Department Commendations, 67 Honorable Mentions, 11 Complimentary Letters. (No disciplinary history in CR file).

9. Joseph Colon, Hispanic- OPS determined that he violated CPD Rules 5, 6, (3 Counts), 14 and 38, in that on September 17, 1992, while off duty, he violated the provisions of General Order 92-3, Addendum I, Section 4A, by being in possession of a firearm not authorized for use by the Department; failed to follow the provisions of General Order 92-3, Addendum I, Section 4M, by using ammunition not authorized by the Department; violated the provisions of General Order 92-3, Addendum 5, Section IV-A, B by using a weapon that was not registered; did unnecessarily use his weapon by firing two shots into the air without justification; failed to perform a duty when he failed to appear in court in a case in which he was the complainant in a criminal case; on September 17, 1992 and November 10, 1992, reported false information as to how he received his injuries, how the incident occurred about where his gun was at the time of the incident and why he fired it. OPS recommended a 15-day suspension. Rodriguez approved. Colon's 5-year Complimentary and Disciplinary History included: Complimentary – No Special Awards, 1 Department Commendation, 95 Honorable Mentions, 1 Complimentary Letter. Disciplinary- Reprimand on Oct. 24, 1988 for operation/personnel violation: vehicle licensing-city; 10-day suspension on January 30, 1988 for operation/personnel violation: miscellaneous.

10. Carlos Cortez, Hispanic- OPS determined that, on June 4, 1992, he violated CPD Rule 8 in that he did maltreat a male individual by using a chemical agent (mace) on the individual without any justification. OPS recommended a 3-day suspension. Rodriguez decreased the recommendation and approved a 2-day suspension. Cortez's 5-year Complimentary and Disciplinary history included: Complimentary-No Special Awards, No Department Commendations, 28 Honorable Mentions, 1 Complimentary Letter. Disciplinary - Reprimand on August 1, 1991 for failure to appear in court or notice supervisor of inability; October 23, 1991- work 1 day without pay for late reporting for duty or court; 1 day off without pay on January 27, 1992 for lounging on post November 9, 1991.

11. Wilman Dones, Hispanic -OPS determined that he violated CPD Rules 2, 8, and 38 on November 17, 1991, in that, while off duty, he unnecessarily displayed a firearm at a male individual and used the firearm to maltreat the individual by striking him in the head; and brought discredit upon the Department by initiating an unjustified physical and verbal altercation with a citizen. OPS recommended a 10-day suspension and Rodriguez approved. (No complimentary or disciplinary history in CR file).

12. Mark A. George, White- OPS determined that he violated CPD Rules 9 and 38 on March 25, 1992, in that while off duty, he did engage in an unjustified verbal altercation with two male individuals and

made an obscene gesture and used profanity at the individuals; he did unnecessarily display his firearm at the individuals and without lawful justification placed his weapon against the head of the other individual. OPS recommended a 7-day suspension. Rodriguez decreased the recommendation and approved a 5-day suspension. George's 5-year complimentary and disciplinary history included: Complimentary - 1 Special Award, 1 Department Commendation, 12 Honorable Mentions, 1 Complimentary Letter. Disciplinary - Reprimand on July 17, 1991 for failing to appear in court or notify supervisor of inability.

13. Robert Grining, White - OPS determined that he violated CPD Rules 6 and 38 in that on July 1, 1993, during the arrest of a male individual, he carelessly and unnecessarily caused his weapon to discharge without justification and unjustifiably fired at the tires; and, during the arrest of a male individual, he was carrying a nickel plated revolver in violation of General Order 92-2 Addendum I, IIIa, 4a. OPS recommended a 2-day suspension. Rodriguez approved. Grining's 5-year Complimentary and Disciplinary History: Complimentary: No Special Awards, 3 Department Commendations, 53 Honorable Mentions, 4 Complimentary Letters. (No disciplinary history in CR file).

14. Bruce Johnson, White - OPS determined that he violated CPD Rules 6 and 38 on March 14, 1995, in that, while on duty, he failed to follow the provisions of General Order 86-8 by discharging his weapon into the air; failed to follow the provisions of General Order 85-1 by his failure to notify the Communication Section of the discharge of the weapon; and without legal justification, pointed his weapon at a male individual. OPS recommend an 8-day suspension. Rodriguez approved. (No complimentary or disciplinary history in CR file).

15. David Kapus, White- (Star # 12637) OPS determined that he violated CPD Rule 8 (2 counts) in that on July 18, 1990, he did maltreat a male individual by beating him about the head and body with his fists and baton; he continued the maltreatment when he shoved the individual out of a doorway and into a parked vehicle. OPS recommended a 15-day suspension. Rodriguez approved. Kapus' 5-year Complimentary and Disciplinary history included: Complimentary - No Special Awards, 3 Department Commendations, 51 Honorable Mentions, 3 Complimentary Letters. Disciplinary - February 13, 1990, Reprimand for inattention to duty.

16. David Kapus, White- (Star # 12637) OPS determined that he violated CPD Rules 8 (2 counts) and 9 on July 21, 1991, when he engaged in an unjustified verbal altercation with a male and female individual by directing a demeaning term at them; that he did maltreat the male individual when he knocked, grabbed, and slammed the complainant against a parked vehicle, then placed his hand around the individual's neck and choked him. OPS recommended a 15-day suspension. Rodriguez decreased the recommendation and approved a 10-day suspension. (No complimentary or disciplinary history in CR file).

17. Edward Kennedy, White - OPS determined that he violated CPD Rules 6, (2 counts), 8 and 14 on September 18, 1993, in that he was in violation of Department rules on the use of deadly force, General Order 86-8, II B., in that he discharged his firearm without lawful justification; he did maltreat a male individual when he struck him on the head with his gun; and was in violation of General Order 92-3, 3, IV, and V, when he was in possession of an unregistered firearm. On October 27, 1993, in his statement to OPS, he denied that he discharged his weapon on September 18, 1993. OPS recommended a 30-day suspension. Rodriguez approved. Kennedy's 5-year Complimentary and Disciplinary history included: Complimentary - No Special Awards, No Department Commendations, 9 Honorable Mentions, 2 Complimentary Letters. Disciplinary - 3-day suspension from April 27, 1990 to April 29, 1990 for violation on December 7, 1989, for operation/personnel violation: medical roll; 1-day suspension on July 13, 1991 for violation on October 2, 1990 for operation/personnel: vehicle licensing-state; reprimand on September 29, 1993 for failing to appear in court or notify supervisor of inability.

18. Robert Knieling, White - OPS determined that he violated CPD Rules 2 and 9 on June 10, 1994, when, while on duty, he did bring discredit upon the Department and impeded the Department's efforts to achieve its policy and goals by his overall actions and conduct by maltreating Shirley Alejos, while she was handcuffed; on June 10, 1994, while inside the tactical office of the 020th District Station, while on duty, he engaged Shirley Alejos, who was handcuffed, in an unjustified physical altercation. OPS recommended a 50-day suspension. Rodriguez approved. Knieling's 5-year Complimentary and Disciplinary history included: Complimentary - No Special Awards, No Department Commendations, 53 Honorable Mentions, 5 Complimentary Letters. (No disciplinary history information in CR file).

19. Rigoberto Marquez, Hispanic - OPS determined that he violated CPD Rules 6, 8 and 14 in that on May 26, 1992, while on duty, he did maltreat a male individual by striking him in the mouth and under the right eye; violated provision of General Order 87-7 by depriving a male individual of his freedom by handcuffing him without justification and transporting him from street location to another alley location; and reported false information in a field contact card he completed. OPS recommended a 10-day suspension. Rodriguez approved. (No complimentary or disciplinary history in CR file).

20. Patrick Murray, White - OPS determined that he violated CPD Rule 38 on January 1, 1994, in that he unlawfully or unnecessarily discharged mace at a male individual. OPS recommended a 5-day suspension. Rodriguez decreased the recommendation and approved a 4-day suspension. Murray's Complimentary and Disciplinary History included: Complimentary - No Special Awards, No Department Commendations, 5 Honorable Mentions, 1 Complimentary Letter. Disciplinary - October 27, 1993, reprimand for failure to appear in court or notice supervisor of inability.

21. Stephen Nassar, White - OPS determined that he violated CPD Rules 6 and 8 on September 28, 1990, in that, while on duty, he failed to comply with the provisions of General Order 80-18, Section III-B and III-D by directing profanities at unknown residents of a building while effecting the arrest of a male individual; he did maltreat the same individual being placed under arrest by kicking him on his body and throwing him into a police transport vehicle. OPS recommended a 30-day suspension. Rodriguez approved. (No complimentary or disciplinary history in CR file).

22. John Riordan, White - OPS determined that he violated CPD Rule 8, in that on December 19, 1990, while in an interview room at Area 6, he did maltreat a male individual when he beat him about the head and face. OPS recommended an 8-day suspension. Rodriguez decreased the recommendation and approved a 5 -day suspension. Riordan's 5-year Complimentary and Disciplinary history included: Complimentary - No Special Awards, 3 Department Commendations, 13 Honorable Mentions, 3 Complimentary Letters. Disciplinary - April 12, 1990, reprimand for failure to appear in court or notify supervisor of inability.

23. Eutimo Rodriguez, Hispanic - OPS determined that he violated CPD Rule 8 on May 2, 1991 in that he did maltreat a female individual when he threw her to the ground without justification. OPS recommended a 5-day suspension. Rodriguez decreased the recommendation and approved a 3-day suspension. Rodriguez's 5-year Complimentary and Disciplinary history included: Complimentary - No Special Awards, No Department Commendations, 9 Honorable Mentions, No Complimentary Letters. Disciplinary - September 24, 1990, reprimand for failure to respond to radio or invest silent radio; failed to respond to numerous pages.

24. Donald Schulz, White - OPS determined that he violated CPD Rules 6,14,15 and 38 (2 counts) in that, on October 5, 1990, while off duty, he was intoxicated and in violation of General Order 90-04, Section II-B, by carrying his firearm while he had consumed alcoholic beverages; he did without justification display and point his firearm at a male individual and did subsequently discharge the same weapon; and on November 16, 1990, he gave false information at OPS regarding the discharge of his firearm on October 5, 1990. OPS recommended a 20-day suspension. Rodriguez decreased the recommendation and approved a 15-day suspension. Schulz's 5-year Complimentary and Disciplinary history included: Complimentary History-No Special Awards, No Department Commendations, 55 Honorable Mentions, 5 Complimentary Letters. Disciplinary History,- April 27, 1990, Reprimand for failure to appear in court or notify supervisor of inability.

25. Roger Silvas, Hispanic- OPS determined that he violated CPD Rules 15 and 38 in that on November 13, 1994, while off duty, he was legally intoxicated with he registered .18 on a breathalyzer and fired five warning shots unnecessarily into the air. OPS recommended a 25-

day suspension. Rodriguez approved. (No complimentary and disciplinary history in CR file).

26. Ross Takaki, Asian, OPS determined that he violated CPD Rules 2 and 9 in that on June 10, 1994, while on duty inside a tactical office of the 20th District Station, he did bring discredit upon the Department and impeded the Department's efforts to achieve its policy and goals by his overall actions and conduct by maltreating Shirley Alejos while she was handcuffed; on June 10, 1994 while on the street, while on duty, engaged Leticia Alejos, Trina Paga, Alma Perez, Annette Penaloza and Melissa Whalen in an unjustified verbal altercation in which he referred to them as "bitches" and "cunts."; that on June 10, 1994, while inside the tactical office of the 20th District Station, he engaged Shirley Alejos, who was handcuffed, in an unjustified physical altercation. OPS recommended a 55-day suspension. Rodriguez approved. Takaki's 5-year Complimentary and Disciplinary History included: Complimentary - No Special Awards, No Department Commendations, 22 Honorable Mentions, 2 Complimentary Letters. (No Disciplinary history in CR file).

In reviewing the discipline imposed by Rodriguez on the 26 police officers with violations similar to Complainant's, the record shows that all of the police officers were found by OPS to have engaged in misconduct of comparable seriousness; however, Rodriguez imposed discipline of varying degrees of suspension on all of the non-Black police officers and none were subjected to discharge by Rodriguez as was Complainant.

Rodriguez offered little to explain the lopsided discipline. I considered that Rodriguez testified that a "meaningful consideration" in his decision to discharge Complainant (Tr. Sept. 14, 2005, p. 452, 20-24) was that Complainant's disciplinary record included a five-day suspension for an altercation with a neighbor and a citation for missing court dates. Rodriguez said that he considered a five-day suspension as being a "serious punishment" that was "indicative of some underlying problem" (Tr. Sept. 14, 2005, p.453, 6-13). Rodriguez further implied that he considered missing court dates as a serious offense. (Tr. Sept. 14, 2005, p. 453, 14-20).

Rodriguez's testimony that he considered missing court dates as a serious offense is simply not credible. Although the disciplinary histories of many of the comparables were not present in their respective CR file, where they were present, the

record shows that Manuel Acevedo, Carlos Cortez, Mark George, Edward Kennedy Patrick Murray, John Riordan, and Donald Schulz were all cited for missing court dates and none received any discipline more severe than a reprimand for this infraction. For Rodriguez to characterize this type of infraction as serious, when none of the comparable police officers received any discipline more severe than a reprimand, is simply not believable.

Moreover, Rodriguez's explanation that Complainant's previous five-day suspension weighed heavily in his decision to discharge him cannot be reconciled when compared with the disciplinary histories of at least two of the comparables. For instance, the disciplinary history of Manuel Acevedo indicates that he received a five-day suspension on February 18, 1988; and Joseph Colon's disciplinary history indicates he received a 10-day suspension on January 30, 1988. Neither was discharged.

Although a comparison of previous disciplinary histories is obviously relevant and I made these comparisons where this information was included in the CR file, in light of Rodriguez's testimony, and considering that disciplinary histories were routinely missing or not included in many of the CR files, the reasonable inference is that previous disciplinary history did not weigh heavily in Rodriguez's disciplinary decisions. Moreover, in making such comparisons where I could, I find no significant variance in disciplinary histories of Complainant when compared to those of the comparables.

Rodriguez downplayed the significance of Complainant's complimentary work history, explaining that, although he reviewed Complainant's complimentary work history, this favorable history did not change his mind. Rodriguez explained that, although Complainant was obviously a good officer, it was "not atypical for someone to be a good officer and still not be suitable for or to do something that's particularly egregious that would cause separation from the department." (Tr. Sept. 14, 2005, p. 458, 14-21).

I note that many of the CR files of the comparables did not include a complimentary history. There was no explanation provided as to why these documents were not included in many of the CR files. In such cases, the only reasonable inference is that those documents were not considered in the particular disciplinary decision. Further, because Rodriguez suggested in his testimony that a police officer's favorable complimentary work history would not necessarily influence his disciplinary decisions, a comparison of complimentary histories is not relevant to this analysis.

During his testimony, Rodriguez attempted to explain that race could not have been a consideration in his decision to discharge Complainant because he had no knowledge of Complainant's race at the time he made the decision. Rodriguez explained that there were 13,400 sworn officers, preventing him from knowing the particular characteristics of any one officer. (Tr. Sept. 14, 2005, p. 471, 23-24; p. 472). I find this testimony disingenuous since Complainant's race and gender and those of the other comparable police officers are clearly indicated on the first page of the OPS investigative summary report, which is included in the police officers' CR files. Rodriguez testified that he reviews the CR file of police officers, which includes the OPS investigative records and discipline recommendation, in making his disciplinary decision. (Sept. 14, 2005, p. 440, 21-24; p. 441).

An employer may justifiably discipline employees engaging in misconduct, but only if the disciplinary criteria are applied alike to all races, *McDonnell Douglas Corp v Green*, *supra*. An employer cannot retain guilty employees of one color, while firing guilty employees of another color. *Loyola*, *supra*, citing *McDonald v Santa Fe Trail Transportation Co.*, *supra*.

The evidence in this record supports that this is exactly what Respondent did. The evidence shows that Complainant engaged in CPD Rule violations that were similar to 26 other non-Black police officers; however, Respondent discharged Complainant

while retaining the other police officers. What is incomprehensible is that several of the comparables not only engaged in misconduct that was similar, they engaged in misconduct nearly identical to Complainant's. For instance, Scott Berry, a White police officer, pushed a male to the ground and struck him in the face with his weapon during an arrest in August, 1994. Rodriguez imposed a 4-day suspension on Berry, while discharging Complainant. Edward Kennedy, a White police officer, struck a male on the head with his gun in September, 1993. Rodriguez imposed a 30-day suspension on Kennedy, while discharging Complainant. Wilman Dones, a Hispanic police officer, used his firearm to strike a male in the head in November, 1991. Rodriguez imposed a 10-day suspension on Dones, while discharging Complainant.

Moreover, several officers were found to have discharged their firearms without justification, misconduct that could arguably be considered even more egregious than the misconduct performed by Complainant. For instance, in March, 1995, Bruce Johnson, a White police officer, discharged his weapon and pointed it at a male. Rodriguez imposed an 8-day suspension on Johnson. Robert Grinning, a White police officer, carelessly and unnecessarily caused his weapon to discharge and unjustifiably fired at the tires of a male in July, 1993. Rodriguez imposed a 2-day suspension on Grining. Mark Allen, a White police officer, unjustifiably fired at a fleeing vehicle in January, 1991. Rodriguez imposed a 10-day suspension on Allen. Joseph Colon, a Hispanic police officer, unnecessarily used his weapon by firing two shots into the air without justification. Rodriguez approved a 15-day suspension on Colon. Roger Silvas, a Hispanic police officer, was legally intoxicated when he fired five warning shots unnecessarily into the air in November, 1994. Rodriguez imposed a 25-day suspension on Silvas.

It is curious that most of the comparables received a measurement of suspension that did not rise to the level of even requiring a Police Board hearing. Respondent fails to

offer any credible explanation for this overwhelming disparity in imposing discipline and there is absolutely nothing in this record to justify such a disparity. Complainant has demonstrated by a preponderance of the evidence that Respondent's articulation for discharging him is unworthy of credence. The facts here support that race animus influenced Respondent's discharge decision.

Damages

The purpose of the damage award is to make the complainant whole. When the complainant has been a victim of unlawful discrimination under the Act, he should be placed in the position he would have been but for the discrimination. *Clark v. Human Rights Commission*, 141 Ill App 3d178, 490 NE2d 29 (1st Dist 1986).

The Parties submitted a stipulation on the amount of damages, with the exception of overtime pay. Complainant seeks back pay from the time of his suspension pending discharge, May 28, 1992, until December 31, 2005. Complainant calculates the back pay amount for this period as \$813,457.91. Complainant subtracts the amount he received for unemployment compensation and income earned during that time period of \$629,492.00. This total amount of lost wages is stipulated to be \$183,965.91.

Complainant also requests his lost pension annuity interest adjustment. The stipulated amount for this item is \$18,338.03.

Complainant requests compensation for 1,400 hours in compensatory holiday time he argues he lost during the May 28, 1992 to December 31, 2005 period due to his having been first suspended pending separation and then discharged. The parties stipulated that the total number of holiday hours accrued in that period were 1,400. However, Respondent presented testimony that a police officer would have not necessarily worked all of the holidays and Complainant testified that he usually worked most holidays, but did not work all holidays. Complainant is entitled to 75% of the total number of holiday hours accrued or 1,050. The parties give me no guidance as to how

these hours should be compensated relative to a dollar figure. Therefore, I find it reasonable to calculate an hourly rate of compensation to be awarded for each of the 1,050 hours pursuant to the following method: According to Exhibit B of the parties' *Stipulation on Damages*, Complainant would have earned \$4,623.50 per month in 1999, the mid-point between his discharge and the public hearing date in this matter. This monthly salary would equate to an hourly rate of \$28.89. Complainant is entitled to 1,050 hours at \$28.89 per hour (\$30,335.00) to compensate him for holiday pay he would have received had he not been discharged.

Finally, Complainant requests between 90-100 hours in overtime pay per year for the period May 28, 1992 to December 31, 2005. As previously indicated, the parties did not stipulate to any overtime pay as part of the damages calculation.

As to the issue of overtime pay, I heard from Complainant and from Frank Wilson (Wilson), who is currently the CPD Director of Finance and has held that position since May, 1996. Complainant testified that he regularly worked between 90 -100 hours of overtime per year. Respondent's Exhibit 60 supports Complainant's testimony. The exhibit presented Complainant's attendance records for the years 1990, 1991 and 1992. For 1990, Complainant earned 96 overtime hours; for 1991, Complainant earned 104 overtime hours; and for 1992, the year of his discharge, Complainant earned 48 overtime hours.

Wilson testified that for 2001-2003, the total number of overtime hours for all police officers was reduced dramatically. Wilson presented a graph (R's Ex 59) indicating that from 2000-2001, overtime hours were reduced by 19%; from 2001-2002, overtime hours were reduced by 10%; and from 2002-2003, overtime hours were reduced by 19%. Wilson further testified that it would be difficult to determine the number of overtime hours a police officer would make from year to year because overtime availability changes pursuant to the policies of the particular superintendent, the budget

director and the city's finances. There were no glaring inconsistencies in the testimony of Wilson when compared to that of Complainant on the issue of overtime. The record supports that overtime hours are indeed difficult to calculate because of the variables related to budget and policy making. Based on the record, it is reasonable to conclude that Complainant would have worked 96 hours of overtime for the years 1992 up to and including 2000. Based on Wilson's credible testimony as to the general reduction in overtime for all police officers, Complainant would have worked 19 % fewer hours in 2001, for a total of 77 hours; Complainant would have worked 10% fewer hours in 2002 than he worked in 2001, for a total of 69 hours; and Complainant would have worked 19% fewer hours in 2003 than he worked in 2002, for a total of 56 hours. Since I heard no testimony specifically related to a reduction in overtime hours for the years 2004 and 2005, Complainant is entitled to the average overtime hours that he worked at the time of his discharge, for a total of 96 hours for each year 2004 and 2005.

Complainant is entitled to compensation for overtime pay for 96 hours per year for the years 1992 up to and including 2000 and for 2004 and 2005; 77 hours for 2001; 69 hours for 2002; and 56 hours for 2003, for a total of 1258 hours in overtime pay. Again, with no guidance on the hourly pay, I find \$28.89 per hour a reasonable amount based on the average projected salary as demonstrated in Exhibit B of the parties' *Stipulation on Damages*. Complainant is entitled to \$36,344.00 in overtime pay.

Reinstatement

According to the *Stipulation on Damages*, Complainant does not seek and waives reinstatement.

Interest

Complainant is entitled to interest on the back pay award.

RECOMMENDATION

Accordingly, it is recommended that the Complaint in this matter be sustained on the race discrimination claim and that Complainant be awarded the following relief:

1. Respondent pay to Complainant lost back pay in the amount of \$183,965.91;
2. Respondent pay to Complainant \$30,335.00 in holiday pay;
3. Respondent pay Complainant \$36,344.00 in overtime pay;
4. Respondent pay to Complainant prejudgment interest on the amounts in numbers 1-3 to be calculated as set forth at 56 Ill.Admin.Code, Section 5300.1145;
5. Respondent to pay Complainant \$18,338.00 in pension annuity interest adjustment;
6. Respondent cease and desist from discriminating on the basis of race;
7. Respondent pay to Complainant the reasonable attorney's fees and costs incurred in the prosecution of this matter, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in *Clark and Champaign National Bank*, 4 Ill. HRC Rep. 193 (1982), said motion and affidavit to be filed within 21 days after the service of the Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees and costs;
8. If Respondent contests the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees;
9. The recommended relief in paragraphs 1 through 5 is stayed pending resolution of the issue of attorney's fees and issuance of a final Commission order.

ENTERED: May 27, 2009

HUMAN RIGHTS COMMISSION

By: _____
SABRINA M. PATCH
Administrative law Judge
Administrative Law Section

Raymond Hayes v City of Chicago Police Dept.
ALS #8290